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ESSAY

ON THE

LAW OF BAILMENTS.

AN

ESSAY

ON THE

Law of Bailments.

By Sir WILLIAM JONES, KNT.

LATE ONE OF THE JUDGES OF THE SUPREME COURT OF JUDICATURE AT BENGAL.

THE SECOND EDITION,

With Introductory REMARKS, and NOTES, comprising the most modern AUTHORITIES,

By JOHN BALMANNO,

OF LINCOLN'S-INN, ESQ. BARRISTER AT LAW.

In tutelis, societatibus, *fiduciis*, *mandatis*, rebus emptis-venditis *conductis-locatis*, quibus vitæ societas continetur, magni est judicis statuere, (præsertim cùm in plerisque fint judicia contraria,) *quid quemque cuique præstare* oporteat.

Q. SCÆVOLA, apud CIC. de Offic. lib. iii.

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TO THE HONOURABLE

Sir SOULDEN LAWRENCE, Knt.

ONE OF THE JUSTICES OF

HIS MAJESTY'S COURT OF KING'S BENCH,

THIS EDITION

OF THE

LAW OF BAILMENTS,

IS RESPECTFULLY INSCRIBED,

BY

THE EDITOR.

ADVERTISEMENT

TO

THIS EDITION.

SHOULD the delay in publishing this Edition of the Law of Bailments be thought worthy of notice, it is hoped that the following circumstance will operate as an apology.

When the Essay was nearly prepared for the press, the Editor, in concurrence with the suggestion of a friend, was induced to attempt a sketch of the life of the late Sir William Jones, with an account of his works, to be prefixed to the publication :—some time was occupied in collecting materials for this undertaking, and

and in its progress the Editor found that he must inevitably exceed the limits he had deemed it necessary to prescribe for its completion;—perceiving also that by the Introduction, Notes, and Appendix, now added, the size of the original publication would be considerably increased, he has declined to insert the biographical account alluded to, from a wish not to incur the charge of overwhelming a small though valuable treatise with extraneous matter. In a literary and critical point of view, the Editor has, perhaps, by this omission, better consulted his own reputation, and the justice due to the illustrious memory of Sir William Jones.

With respect to the work in its present form, the Editor takes leave to observe that his particular aim has been to render it an useful repository on the subject of

BAILMENTS,

BAILMENTS, to the MERCHANT and the STUDENT OF THE LAW; he has therefore occasionally dilated his references to the material modern cases, and has given, in the form of an Appendix, the celebrated case of "*Coggs* v. *Bernard*," from Mr. Bayley's valuable edition of Lord Raymond's Reports.

Sir William Jones (Law of Bailments, p. 59) modestly intimates that his Essay may be considered in the light of "a commentary" on Lord Holt's famous argument in the case just mentioned; it is, however, one of those rare commentaries which merit equal attention with the text. To every class of persons in a civilised community, the subject of our Author's treatise is important; and of the work itself, it is no extravagant encomium to pronounce, that the learning of Lord Coke could not have supplied

supplied sounder law, and that more apposite and elegant illustration could not have flowed from the pen of Cicero.

These are sufficient reasons for presenting to the Public a new Edition of the LAW OF BAILMENTS; and in proportion to their weight, he who has undertaken the task will naturally be gratified, if it shall be thought that he has not performed less than his duty.

PUMP COURT, TEMPLE;
Nov. 10, 1797.

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INTRO-

INTRODUCTION.

THE commercial intercourse of mankind is at once the most pleasing and important subject of investigation: those various wants which pervade the most barbarous and refined conditions of society, stimulate the warlike savage to commence the labours, and to barter the spoils of the chase; while under a similar influence the inhabitant of the already opulent and civilized country endeavours to explore new sources of wealth, and tempts with avidity the perilous vicissitudes (*a*) of mercantile adventure.

(*a*) "Mercator * * * * * *
"* * * * * * * * * mox reficit rates
"Quassas, indocilis pauperiem pati."
HOR.

Thus it should seem, that with whatever difference of local circumstances, and with whatever varieties of mental and corporeal character, Nature has distributed our species over the globe, she still intends that a general connexion shall subsist between them, and has caused it to depend on motives too powerful or inviting to be counteracted by ferocity, indolence, or caprice.

A propensity that so strongly indicates the policy of Nature ought obviously to receive every necessary encouragement from the policy of states; nothing therefore but ignorance, or a despicable affectation of philosophy, can doubt or deny the advantages of foreign commerce; our gratitude should avow, and our activity strive to increase them: it may however, in perfect consistency with this sentiment, be asserted, agreeably to the remark of a profound historian (*b*), that the improve-

(*b*) Hume's Hist. Append. III.

ment

ment of the domestic trade of a country is to be considered as an object of much earlier and greater attention.

Notwithstanding this truth, so obvious and important, it is a remarkable fact in the history of commercial nations, that they have mostly established an extensive foreign intercourse, long before they appear to have thought of promoting the facility of their internal trade, and of protecting its growth, in the concomitant variety of civil transactions, by the application of those discriminating rules, which impart the ingenuity and the correctness of general reason, to systems of local jurisprudence.

What have been the specific causes of this neglect, the most acute investigation would probably be unable to discover. In the frequently inexplicable conduct of mankind, there is a crowd of instances in which

advantages important, and easy to be obtained, are disregarded, for the pursuit of others more distant and precarious. When nations thus deviate from the path of prudence, they are slower in recovering the prospect of their true interest than individuals; as error when consolidated into a mass is proportionably less penetrable by the light of reason and utility.

However latent the causes why so great an object of national policy has experienced such a comparatively slight attention, it is easy to discern the beneficial influence which, if properly cultivated, it has a tendency to produce on the manners and resources of a people. Superficial and often vicious refinements may be communicated by foreign connexions, but it is indisputably true that the real civilization of a country depends much less on its commercial transactions with other states, than on a close and constant inter-

intercourse among its own inhabitants. Such an intercourse is clearly requisite to supply a community with permanent means of subsistence and self-protection, and to promote the growth of social sympathy and confidence among its various members (*c*).

It is also by being thus early and steadily attentive to the essential purposes of their connexion in single states, that men become adapted to form more extensive political and commercial relations; for the mere wealth and intercourse of foreign traffic are not alone sufficient to give polish, humanity, and equity to national character, any more than permanency to national resources. Instances may be easily recollected of nations highly conspi-

(*c*) Vattel's Law Nat. b. 1. c. 8. § 84. 86. See also Smith's "Wealth of Nations," b. 3. c. 1. for a concise and masterly explanation of the principles of internal trade.

cuous

cuous in the annals of commerce, which have exhibited disgusting scenes of internal barbarism and disorder, and which have incurred in their public conduct the deserved imputations of fraud and cruelty.

The vices however which a community is liable to contract from a too eager and exclusive pursuit of foreign commerce, are not upon the whole by far so inimical to the happiness of the world, as the erroneous and destructive policy that converges all the talent and industry of a state into a focus of warlike ambition. The spoils of military aggression are palpably more criminal than the gains of commercial avarice, and they are equally fugitive: to obtain them the earth must be desolated; and when acquired, they constitute neither a just nor a permanent resource.

The

The pernicious effects of both these extreme pursuits are forcibly exemplified in the history of the celebrated rival powers of Carthage and Rome. The Carthaginians had engrossed nearly all the commerce of the ancient world; but their avidity in the acquisition of meretricious wealth estranged them from the more important views of sound policy and legislation: their deficiency in this respect was conspicuous in the duplicity which frequently sullied the character of their public transactions, and in the factious ebullitions (*d*) which destroyed the internal vigour of the state.

Under

(*d*) It cannot be asserted that Rome was always free from the violence of party contentions; the great aims of the commonwealth were, however, invariably supported by the proud zeal of all its members, and the passions and importance of the individual were absorbed in the grandeur of the republic. This difference is thus remarked by Montesquieu in a work of less genius but of closer reasoning than the "*Esprit* "*des Loix.*"

"A Rome

Under this peculiar disadvantage was the strength of Carthage opposed to that of Rome; and though the former, by the extent of its factitious resources, was enabled to protract the period of its downfall, yet the persevering energies and the severe discipline of the Romans, prompted by the congenial spirit of their political institutions, ultimately, and as it were by necessity, prevailed. It was in vain that Annibal led his mercenary swarms with

" A Rome gouvernée par les loix, le peuple souf-
" froit que le sénat eût la direction des affaires. A
" Carthage gouvernée par des abus, le peuple vou-
" loit tout faire par lui-même.

" Carthage, qui faisoit la guerre avec son opulence
" contre la pauvreté Romaine, avoit par cela même
" du désavantage: l'or & l'argent s'épuisent; mais
" la vertu, la constance, la force & la pauvreté ne
" s'épuisent jamais.

" Les Romains étoient ambitieux par orgueil, &
" les Carthaginois par avarice; les uns vouloient
" commander, les autres vouloient acquérir: & ces
" derniers calculant sans cesse la recette & la dépense,
" firent toujours la guerre sans l'aimer." Grand. et Dec. des Rom. c. 4. p. 34.

triumph

triumph over Italy, and threatened to approach the walls of Rome; he had to encounter his greatest opposition in the inflexibility of the Roman character; and the victories to which his illustrious military talents had chiefly contributed, were destined to immortalize the prudence of Fabius and the ardour of Scipio, and to serve merely as brilliant preludes to that catastrophe, the cause of which has been superficially recognized in the luxurious indulgences of Capua.

The illicit conjunction of courage and rapine gave birth and importance to the Roman republic, which in its turn moulded the notions and habits of its citizens to a surprising and formidable perseverance (*e*) in

(*e*) " Rome étoit faite pour s'aggrandir, & ses loix " étoient admirables pour cela. Aussi dans quelque " gouvernement qu'elle ait été, sous le pouvoir des " rois, dans l'ariſtocratie, ou dans l'état populaire, " elle n'a jamais cessé de faire des entreprises qui

in the same system. The brilliancy of success with which that system operated on the vast theatre of the world, has attracted the applause which the bulk of mankind too willingly bestow on the triumphs of conquest, however ill they may accord with the principles of justice: The tremendous hostility of the Roman arms was generally unprovoked by aggression, and frequently attended by rapacious and tyrannous insolence; and independently of the disgust which these vices must excite in the mind of the philosophical politician, he will view the narrow and improvident domestic policy of the all-victorious commonwealth with a

" demandoient de la conduite, & y a réussi. Elle ne " s'est pas trouvée plus sage que tous les autres états " de la terre en un jour, mais continuellement: elle " a soutenu une petite, une mediocre, une grande for- " tune avec la même supériorité; & n'a point eu de " prospérités dont elle n'ait profité, ni de malheurs " dont elle ne se soit servi." Grand. et Dec. des Rom. c. 9. p. 109.

contempt

contempt which cannot be dazzled by the splendour of its most unsullied atchievements. The Romans were indeed enabled to subsist by the spoils of conquest, while the uncorrupted science and spirit of their military character secured them the superiority in the conflicts of the field; but their notorious and avowed disregard of every pursuit (*f*) but that of arms, threw a strong shade of wilful ignorance over the lustre of their warlike exploits; nor when the energies of the republic were effaced by the magnificence of the empire, and satiated conquest afforded time

(*f*) Trade, both foreign and domestic, together with philosophy and the arts, were despised and prohibited by the austere bigotry of the republican manners. Fabricius, when at the table of Pyrrhus, expressed a wish that the peaceful doctrines of Cyneas, the Epicurean philosopher, who was present, might enervate all the *enemies* of Rome; and the elder Cato is known to have advised the expulsion of a celebrated sophist from the city, that he might not corrupt the robuſt character of the Roman youth, by teaching them the ingenious art of disputation.

for speculation, did the Roman government listen to the suggestions of national prudence: with a disgraceful anxiety the dominating power of the universe depended for subsistence on the tributary harvests of Africa, and the granaries of Egypt were emptied for the idle and licentious populace of Rome.

Such are the striking lessons imparted by the free pencil and the vivid colours of history: let them be contemplated not less for instruction than amusement; and let that nation justly deem itself respectable which is enabled by commerce to increase its wealth, and by courage to protect its honour; which is at once enterprising and generous abroad, and the free structure of whose government facilitates every improvement at home (*g*)

Next

(*g*) Why should we be deterred from applying this character to our own country, by the querulous and fasti-

Next to a conviction of the moral and political importance of domestic trade,

faſtidious reproach of national pride? The philoſophic and impartial Monteſquieu has led the way; and another foreign writer of conſiderable eſtimation thus deſcribes the community of which we are members:—

"That illuſtrious nation diſtinguiſhes itſelf in a "glorious manner by its application to every thing "that can render the ſtate the moſt flouriſhing. An "admirable conſtitution there places every citizen in "a ſituation that enables him to contribute to this "great end, and every where diffuſes a ſpirit of true "patriotiſm, which is zealouſly employed for the pub-"lic welfare. We ſee there mere citizens form con-"ſiderable enterprises in order to promote the glory "and welfare of the nation; and while a bad prince "would be abridged of his power, a king endowed "with wiſdom and moderation finds the moſt powerful "ſuccours to give ſucceſs to his great deſigns. The "nobles and the repreſentatives of the people form a "band of confidence between the monarch and the "nation; concur with him in every thing that con-"cerns the public welfare; eaſe him in part of the "burden of government; confirm his power; and "render him an obedience the more perfect, as it is "voluntary: every good citizen ſees that the ſtrength "of the ſtate is really the welfare of all, and not that "of a ſingle perſon." Vattel Law Nat. b. 1. c. 2. § 24.

the

the best means of improving it should employ our attention. There is certainly no department of public service more useful than the patronage of the mechanical ingenuity, by whose inventions and improvements the necessity for animal labour (*b*) is diminished, and the accomplishment

(*b*) No prejudice can be more absurd and mischievous than that which has frequently objected to improvements in mechanism, on the ground of their tendency to abridge the employment of the laborious part of society. Among the principal advantages resulting from the civil association of mankind, we may surely class the opportunity afforded to individuals, of dedicating their talents to the benefit of the public, and the power of the latter to bestow adequate remuneration for the time and the ability which are so employed.

In return for such disbursements from the common ſtock, the personal convenience and profit of every member of the community are more than proportionably increased.

A solicitude to reduce animal labour within moderate and reasonable limits, is not merely to be recommended on the score of political economy, but as one of the moſt amiable features of civilization: multitudes of our fellow-creatures are thereby rescued from the deplorable ignorance that generally accompanies the

plishment of those great and beneficial works, by the assistance of which the natural and manufactured productions of a country are conveyed with facility and cheapness to all its parts.

Among the most powerful means by which these important objects have been promoted, we may rank the use of STEAM, and the increase of INLAND NAVIGATION. The discovery of the wonderful powers and utility of condensed vapour is of a modern date, but would have been worthy of producing the traditional boast (*i*) of Archimedes. The variety of purposes (*k*) to

the lot of manual drudgery, and being thus advanced a rank higher in the species, may become eligible for many employments in which the understanding has a share, and which so greatly abound in a civilized and wealthy country.

(*i*) That with a fulcrum for his engines he would be able to move the world.

(*k*) The use of steam engines is now adopted in most works of magnitude, such as breweries, foundries,

to which the agency of those powers is applied in this country, together with the many specimens of machinery by which our different mechanical operations are facilitated, shew to what perfection the improvement of trade and manufactures may be advanced under the auspices of a free government, and an active commercial spirit.

The importance of inland navigation cannot be too strongly asserted: Nature has greatly assisted the internal trade of some countries by abundance of rivers; and it is a just tribute to the enterprising genius of man, to admire the extent to which that advantage has been increased or supplied by the means of navigable

ries, collieries, &c. Much praise is due to "Messrs. Boulton and Watt," of Birmingham, for their liberal, indefatigable, and successful endeavours to render the discovery beneficial to the public.

canals.

canals (*l*). Many of these stupendous monuments of human sagacity and perseverance have distinguished the most enlightened and opulent countries of the ancient world. The Egyptians, who were justly renowned for science and the arts, completed the character of high civilization by an assiduous attention to their internal trade (*m*), and the intercourse necessary to conduct

(*l*) Smith's Wealth of Nations, vol. i. p. 28. 228. 9. —A writer who has given much attention to the subject, thus observes on the utility of canals: "All "canals may be considered as roads of a certain kind, "on which one horse will draw as much as thirty "horses do on the ordinary turnpike roads, or on "which one man alone will transport as many goods "as three men and eighteen horses usually do on com- "mon roads. The public would be great gainers were "they to lay out upon the making of every mile of "a canal twenty times as much as they expend upon "making a mile of turnpike road; but a mile of "canal may often be made at a less expence than "the mile of turnpike, consequently there is a great "inducement to multiply the number of canals." Phillips's Hist. Inland Navig. pref. p. 9.

(*m*) A fragment by Gray, in which philosophy and poetry are exquisitely blended, has the following descriptive lines:

conduct it was facilitated by the same canals, which were constructed by the provident labour of that once free and polished people, to distribute the capricious bounty of the Nile.

The large territory and immense population of China have always rendered domestic trade an object of peculiar importance to that venerable empire: its whole surface is intersected by navigable

" What wonder, in the sultry climes, that spread.
" Where Nile redundant o'er his summer bed
" From his broad bosom life and verdure flings,
" And broods o'er Egypt with his wat'ry wings,
" If with advent'rous oar and ready sail
" The dusky people drive before the gale;
" Or on frail floats to neighb'ring cities ride,
" That rise and glitter o'er the ambient tide."

See Mason's edition of Gray's works, 4to. p. 199. When the taste, genius, and erudition of Gray are considered, it must be sincerely regretted that he did not complete a poem on a plan so excellent and original. The chasm has been coarsely supplied by Mr. Knight's poem on " The progress of Civil Society," 4to. published 1797.

canals,

canals (*n*), which are constantly employed in the conveyance of produce and merchandize between its various towns and provinces. The tenacious formality of the Chinese character, and a very partial commerce with European nations, have militated

(*n*) One called the "Great Canal," is thus described by Mr. Phillips, in his "History of Inland Navigation," p. 8, 9:

"The Great Canal, which is also called the Royal "Canal, is one of the wonders of art: it was finished "about the year 980; thirty thousand men of all de- "nominations were employed forty-three years in "completing it. It runs from north to south, ex- "tending from the city of Canton to the extremity "of the empire; and by it all kinds of foreign mer- "chandize, entered at that city, are conveyed direct- "ly to Pekin, being a distance of 825 miles. Its "breadth is about fifty feet, and its depth a fathom "and a half, which are sufficient to carry barks of "considerable burthen, which are managed by mast "and sails, as well as by oars; and some of a smaller "sort are towed by hand. This Canal passes through, "or near, forty-one large cities; it has seventy-five "vast sluices to keep up the water, and pass the barks "and ships where the ground will not admit of suffi- "cient depth of channel, besides several thousands of "draw and other bridges."

against the introduction of modern improvements in the sciences into China; it is however admitted, that from an immemorial period of time, the first principles of the arts have been known in that country; nor can we hesitate to ascribe the remarkable industry and highly civilized manners of its people, to the multifarious employments and perpetual intercourse created by a home trade, unexampled in magnitude (*o*) of consumption.

The utility of navigable canals has not escaped the attention of European countries. By the assistance of this species of navigation, Holland (*p*) has long been enabled

(*o*) It is observed by a celebrated writer, that "the "home market of China is perhaps, in extent, not "much inferior to the Market of all the different "countries of Europe put together." Wealth of Nations, vol. 3. p. 32.

(*p*) "The slow canals, the yellow-blossom'd vales,
"The willow tufted banks, the gliding sails,
"The crowded mart, the cultivated plain,"—

These

enabled to combine, in an eminent degree, the advantages of external and inland trade. Russia (*q*), Sweden (*r*), Denmark,

These were among the features noticed by the descriptive pen of Goldsmith (*Traveller*), but the scene is now miserably changed; the acrimonious violence of faction has degraded the character, subverted the independence, and almost annihilated the commerce of Holland.

(*q*) The largest of the Russian canals is that of "Vishnei-Voloshok." It was projected and finished in the time of Peter the Great, and effects a communication between the Caspian and the Baltic seas. See Phillips's Hist. Inland Navig. p. 26.

The same writer, observing on the great opportunities for inland navigation in Russia, states, that in that empire it is "possible to convey goods by water "*four thousand four hundred and seventy-two miles*, "from the frontiers of China to Petersburg, with an "interruption of only about sixty miles; and from "Astracan to the same capital, (by the canal of "Vishnei-Voloshok,) through a space of *one thousand* "*four hundred and thirty-four miles*; a most astonish-"ing tract of inland navigation, almost equal to one "fourth of the circumference of the earth." P. 26.

(*r*) In canal experiments Sweden has been less fortunate than its former rival. There remain the ruins of some very costly but abortive works, patronized by Charles

mark (*s*), and France (*t*), have also made prodigious exertions to effect such artificial communications.

The beneficial consequences with which, for the most part, those endeavours have been attended, evince that there is scarcely any form of government, however depressing

Charles the XIIth, during the lucid intervals of his military madness.

(*s*) The canal of "Kiel," in the duchy of Holstein, does great credit to the sagacity of the Danish government. This canal was projected to enable vessels, "not exceeding one hundred and twenty tons, "or not drawing above ten feet water, to pass immediately from the Baltic into the German Ocean, and "proceed without unloading to Hamburg; or sail to "Holland, England, or other parts, which in times "of war receive supplies from Denmark." Phillips's Hist. Inland Navig. p. 46.

(*t*) Of the various canals of France, that of Languedoc is the most remarkable: it was begun and completed by M. Riquet, a celebrated engineer, in the time of Louis the XIVth, and would alone be sufficient to immortalize the reign of that monarch. For a circumstantial account of this truly magnificent, scientific, and useful work, see Phillips's Hist. Inland Navig. p. 53—56.

in

in some of its tendencies, under which domestic trade, after a certain degree of encouragement, will not rear its head and flourish.

This must be a gratifying reflection to the mind that is accustomed to contemplate, with benevolent curiosity, every step that leads to the comfort and civilization of our species; such a mind will therefore experience peculiar satisfaction in viewing the velocity of the success that generally follows the spirited commercial enterprises even of individuals, when favoured by the genius of free political institutions, and protected by the solicitude of numerous and equitable laws.

The present state of the inland navigation of our own country forcibly illustrates the preceding remark: notwithstanding a great increase of home trade, and the example of the means adopted by other countries

countries to facilitate internal commerce, England, till within these fifty years, had neglected to improve the natural advantage of many rivers, by the construction of navigable canals.

The first navigable canal in this country was begun by a nobleman (*v*), whose various

(*v*) The DUKE OF BRIDGEWATER, who in the year 1759 obtained an act of Parliament, enabling him to make a navigable canal from Worsley to Salford. For a particular and interesting account of the progress and completion of this canal, see Phillips's Hist. Inland Navig. c. 7. where the utility of the undertaking is thus described :—

" Before the duke began his canal, the price of " water carriage by the old navigation on the rivers " Mersey and Irwell, from Liverpool to Manchester, " was twelve shillings the ton, and from Warrington " to Manchester, ten shillings the ton. Land car- " riage was forty shillings the ton, and not less than " two thousand tons were yearly carried on an average. " Coals at Manchester were retailed to the poor at " seven-pence per hundred weight, and often dearer. " The duke, by his navigation from Liverpool to " Manchester, carries for only six shillings a ton, " and in as short a time, and with as certain delivery

" as

various plans for the improvement of our inland navigation have been crowned with signal and deserved success.

This respectable and spirited example has had its proper influence, by stimulating the plans and the completion of similar undertakings. The number of navigable canals already constructed, and those which are in contemplation to be made in various parts of the kingdom, demonstrate at once the public utility, and

" as if by land carriage, because he is able, at the " lowest neap tides, to come into or go out of his " canal at Runcorn Gap to Liverpool, which he could " not do if he had gone in at the Hempstones, as was " at first intended; consequently one half is saved to " the public of the old water carriage, and almost six " parts in seven of the land carriage. Coals also are " delivered at Manchester, seven score to the hundred " weight, for three-pence halfpenny."

In the projection and execution of this and similar works, the duke was assisted by the late Mr. Brindley, a self taught engineer of uncommon abilities. Particulars of the life of that extraordinary man are recorded in the *Biographia Britannica*, vol. 2.

the private advantages of this species of property; shares in which are now become of such consequence, as to form very frequent funds for provisions in family settlements.

Thus greatly has Britain, within the compass of half a century, improved her inland navigation; and all who feel interested in the prosperity of our country will be happy in perceiving, that while good faith, enterprising industry, and superior manufactures have placed it at the head of commercial nations, its internal trade is rapidly advancing to the utmost improvement of which it is apparently susceptible (*u*).

The

(*u*) In a valuable work lately given to the public by a respectable and intelligent magistrate, it is observed, that in this country there has been "an accu- "mulation of not less than two thirds in commerce, "as well as manufactures." Treatise on the Police of the Metropolis, 4th edit. p. 409.

The

The transactions which form the intercourse of an extensive domestic trade, and the various confidential occurrences which attend the increased relations of a civil community, obviously require for their definition and protection a multiplying series of legislative provisions. The aptitude of

The same work gives the following estimation of the annual commerce of the metropolis alone:—"Above 13,500 vessels, including their repeated voyages, arrive at and depart from, the port of London with merchandize, in the course of a year; besides a vast number of river craft employed in the trade of the interior country, bringing and carrying away property estimated at *seventy millions sterling*.

"In addition to this, it is calculated that above 40,000 waggons and other carriages, including their repeated journies, arrive and depart laden, in both instances, with articles of domestic, colonial, and foreign merchandize; occasioning a transmit of, perhaps, (when cattle and provisions sent for the consumption of the inhabitants are included,) *fifty millions more*." P. 410, 11.

Dr. Aikin, in his History of Manchester (4to. 1797), remarks the interesting progress of manufactures and trade, and the concomitant habits of their respective stages, with a precision and philosophy not inferior to the pen of Smith.

such legal regulations peculiarly demands the care of those to whom the higher concerns of the state are entrusted; for if that vigilance were not exercised, it would be in vain that a country might labour for its own prosperity. In proportion also as laws become necessarily more numerous, it should be recollected, that precision is their greatest ornament; other productions of the human genius may be allowed to derive their charms from the beauty of metaphor and the grandeur of general expression, but the utility and the praise of a municipal code will depend on the dry simplicity and scrupulous detail with which it is adapted to the purposes of public security and social confidence.

When we contemplate the slow progress by which nations, civilised in many other respects, have arrived at a moderate degree of perfection in the legislative science, our wonder

wonder is excited, that the very first purposes of benefit for which the species can be supposed to associate should be postponed to the latest consideration.

Philosophy would be idly occupied in attempting to develope, by hypothesis and conjecture, the cause of this inversion in the pursuits of society; but concerning the spirit and the tendency of the positive institutions which have prevailed in celebrated states, disquisition may be profitably employed, and on this topic history presents abundance of materials to excite the vivacity of speculation, and recompence the labour of research (*w*).

Among

(*w*) The profound researches of Montesquieu, illuminated by a genius powerful and vivid, have explored the principles of a science the most important to the happiness of mankind. With some exception to the predominating tenet of the influence of climate, the "Esprit des Loix" displays a fulness of learning, philosophy, and political sagacity, before which

Among the consequences of the great and rapid vicissitudes which have frequently befallen the grandeur of nations, none is more deeply to be regretted than the subversion of those systems of internal polity which have resulted from mature civilisation, together with that of the political importance of the countries where they have existed. This abuse of conquest is often productive of a slothful and morbid degeneracy (*x*) of the human intellect, by

which the superficial effusions of Voltaire, and even the ardent reveries of Rousseau, sink into insignificance. It is however to be lamented, that their countrymen have not taken the benefit of such a comparison, and that, in the progress of the mighty revolution that still astonishes Europe, the dogmas of Rousseau, Voltaire, and an imitative herd of declaimers on the science of government have been adopted, in preference to the practical, sober, and wise lessons of the immortal Montesquieu.

(*x*) "Ut corpora lente augescunt, cito extinguun-
"tur, sic ingenia studiaque oppresseris facilius, quam
"revocaveris. Subit quippe etiam ipsius inertiæ dul-
"cedo: et invisa primo desidia postremo amatur." Tacitus in vit. Agric.

destroy-

destroying the institutions which are calculated to excite and perfect its finer exertions: the fire of national genius has indeed sometimes revived by the energy of a few remaining sparks, and, after ages of dreary ignorance, has poured a sudden lustre on the clouded regions of art and literature. This, however, is but a small recompence for the irretrievable loss of exemplary institutions, much more essential to the happiness of society: the mandate of Omar, that consigned the Alexandrian library to the flames, was infinitely less injurious to the improvement of mankind, than the destruction of the remains of the admirable polity which Egypt (*y*) had exhibited in its days of splendour, and from which accomplished Athens derived its infant rudiments of civilisation.

(*y*) See Diodorus Siculus, lib. 1. Lord Kaims's Historical Law Tracts, p. 77 (note); and Drummond's Review of the Governments of Sparta and Athens, p. 35. It is a subject of regret that a proper history of Egypt still remains among the *desiderata* of literature.

The

The fragments that remain of the legal institutions of Athens have been chiefly preserved in the harangues of the orators.—From the frivolous and unjust grounds of accusation, the indecent violence and capricious cruelty which history has imputed to most of their state prosecutions (z), the criminal jurisprudence of the Athenians appears to have been grossly defective. In adjusting the rights of property (*a*), and

(z) See Mitford's Hist. Greece, vol. 5. c. 22. This writer is entitled to a high rank among historians: unseduced by the blandishments of fable, and superior to the influence of classical prejudices, he has investigated the policy and characters of the Grecian states with an acuteness of penetration, and a solidity of judgment, adapted to the true purposes of history.

(*a*) Dr. Adam Smith observes (Wealth of Nations, vol. 3. p. 176.), that, "law never seems to have "grown up to be a science in any republic of ancient "Greece." This remark is certainly too general; for the speeches of *Isæus* on the laws of succession to property at Athens display much logical subtilty of argument, many appeals to former decisions, and great nicety in the choice and arrangement of evidence. A translation of this legal orator, with a copious and learned commentary, was given to the public (4to. 1779) from the masterly hand of Sir William Jones.

in

in the cognizance of ordinary transactions, the decisions of their tribunals were doubtless marked by a more respectable character.

The flourishing state of commerce and the arts among the Athenians, and the volatile temper of that celebrated people, were calculated to encourage forensic litigation (*b*); and under the mild and auspicious genius of Solon, their municipal laws imbibed the spirit of order and discriminating equity. Unfortunately Athens did not enjoy the uninterrupted benefit of the wise regulations of her illustrious legislator; they were, indeed, treated with apparent respect, but lost their salutary energy in the turbulent commotions of civil discord, which prepared the downfal of the Athenian republic.

(*b*) In Sir William Jones's prefatory discourse to the speeches of Isæus (p. xviii—xxxiii.), see a curious and analogical account of the progress of an Athenian law-suit.

The singular constitution and legal regimen of Sparta, though hostile to every species of commerce, irresistibly attract our momentary notice. The name of Lycurgus has been officiously blazoned on the tablet of immortality; but if the reputation of a legislator be truly founded on the tendency of his labours to the moral and political improvement of mankind, what superficial dogmatist can successfully contend for the superiority of Spartan laws and Spartan manners? on a government which formed the citizen by extinguishing the benevolent feelings of the man; which taught him to spurn with savage affectation (*c*), the gifts of science,

(*c*) Some shocking traits of *imitative* ferocity appeared in the *furor* of the French revolution: the civilised world beheld the spectacle of mothers, fathers, sons, and brothers, disclaiming and reviling the ties of nature! The outrages against science were equally atrocious—one instance must excite peculiar regret and indignation: During the infernal despotism of Robespierre,

science, and the amiable virtues of domestic life:—fanciful speculators may lavish their encomiums, but the rational politician will pronounce it to have been the abominable triumph of a factitious barbarism and ignorance, over the genuine dictates of Nature, and the wise purposes of legislation.

The progress and perfection of the Roman jurisprudence present an interesting subject of discussion (*d*) to the scholar and the

bespierre, the celebrated chemist Lavoisier, who had devoted a blameless life, and a large fortune, to scientific pursuits, was condemned to death by the mock jurisdiction of the revolutionary tribunal. He solicited the indulgence of a few days to finish some experiments, the result of which was likely to be important; his request was denied; and he was insultingly told that France did not want philosophers, but *good patriots!* From such arbiters of patriotism Heaven defend *us!*

(*d*) See Gibbon's Dec. and Fall Rom. Emp. c. 44. This chapter is only a brilliant *coup d'œil* on a sub-

the lawyer; while the philosopher must admit that Rome, in some degree, expiated the mischiefs of her too successful military ambition, by the promulgation of the rational and noble system of law, which at a later period, was compiled, arranged, and completed under the auspices of Justinian.

It must be acknowledged, that the institutes of the civil law, thus promulgated under the patronage of imperial authority, contain some passages which exhibit a disgraceful contrast to the character and maxims of *republican* Rome. The entire and dangerous conjunction of the legislative

ject which it was a part of Mr. G.'s historic duty to have examined with microscopical attention. The many pages he has employed in the malicious detail of theological controversy, and the numerous notes in which he has perpetuated the scandal and obscenity of insignificant writers, might have been occupied with disquisitions and illustrations more creditable to the candour and the talents of the historian.

and

and executive powers; and the consequent *practical* imputation of infallibility to the prince (*e*), have also been justly held repugnant to the spirit of a constitution, which blends the purest parts of democratic liberty with the advantages of the monarchical and aristocratical systems. But the time is long past in which the vigilant jealousy of an English patriot could reasonably apprehend the freedom of his country in danger of being contaminated (*f*) by the slavish flattery

(*e*) The "quod principi placuit legis habet vigorem" of the imperial institutes, was interpreted very differently from our legal maxim that "the king can do no wrong." The latter, so far from implying or encouraging absolute power, is used for the purpose of fixing an unequivocal responsibility on those officers of the state, from whose advice public measures are adopted.

(*f*) The fraudulent and tyrannic perversion of the civil law by the Popish clergy, in a dark and superstitious age, may fairly account even for the abhorrence with which it was spoken of by our old common lawyers, and for the obstinacy with which they

tery of the Byzantine court: it may now be viewed with a mixture of pity and disdain, while the ingenious discriminations, and correct reasoning of the Roman jurists, are occasionally permitted to impart their light and authority to the decisions of our municipal tribunals.

Of those decisions the Law of Contracts, as applied to commercial transactions, now embraces the most considerable part: the laws that regulate the descent and the transfer of real property are the early specimens of stability and civilisation in a government: when refinement advances and wants multiply, invention and labour, ductile to every form suggested by the convenience of man, create new species of

they opposed its introduction into this country: but what in the days of Fortescue and Sir Edward Coke was honest and salutary prejudice, would be illiberal and noxious, at a period when civil rights and duties are accurately understood.

wealth,

wealth (*g*), which circulate with almost a magical rapidity through the various channels of foreign and domestic trade.

The bold outlines of the Law of Nations have been found competent to re-

(*g*) Among the many important avocations of literature, it would be surprising if some disquistion had not been employed on the sources of national opulence. On this subject the speculations most worthy of notice have originated with the moderns, and among these the French writers are decidedly superior in the novelty and the ingenuity, if not for the practicability of their doctrines. The tenets of the celebrated sect of *Economists* are faithfully represented by Dr. Adam Smith (Wealth of Nations, b. 4. c. 9.). The facts and reasonings contained in that very respectable work have procured a just applause to the diligence, the acuteness, and philosophical talents of the author, but might, without injury to his reputation, have been more artlessly given to the public. Like the speculatists alluded to, he has clothed with the formality of system an inquiry, in the scope of which, doubtless, many important principles remain to be investigated, and has thereby contributed to found in this country a school of dogmatists in the yet very imperfect science of political economy.

gulate

gulate the general transactions of external commerce; but that which exists within a state, requires, in proportion to its extent and encouragement, a far more positive and minute system of jurisprudence. To provide for the various circumstances which affect the deposit and the transmission of moveable property—to discriminate the shades of identity which belong to fraud, negligence, or accident, is what only a well digested system of laws can teach, and what none but a people emulous of civil improvement will be disposed to learn.

By this scale we ought to estimate the value of such a body of reason as THE ROMAN CIVIL LAW, and to measure our regret that the victorious barbarians of the North, while they triumphed over the military degeneracy, did not respect the legal wisdom of vanquished Rome: but

it

it is the prerogative of conquest to palsy the improvement of mankind—the enlightened and systematic jurisprudence of the Civilians was supplanted by numerous codes, whose uncouth and monstrous features betrayed their savage origin: the civilised world seemed to relapse into worse than primæval barbarity, and Europe exhibited for many ages a scene of ignorance, disorder, and rapine, which it grieves the philosopher to review, and fatigues the historian to describe.

From this barbarous chaos of laws sprung the feudal system, which had comparative merit in the gradation of its parts, and the compactness of its form, but which was equally repugnant to the progress of commercial industry, and civil order. The proud chieftains who, for stipulated advantages, conducted their obsequious vassals to the field, and who employed the intervals

tervals from foreign war in the tumults of intestine discord, the lawless violence of territorial robbery, or the coarse debaucheries of the castle; these and their idle retainers were not less hostile to commerce and refinement than the Huns, the Goths, and other barbarians, who, at different periods, poured their desolating swarms over the most fertile and civilised provinces of Europe.

ENGLAND, notwithstanding a geographical seclusion, classically proverbial (*b*), experienced the ravages of various invasions, from the doubtful conquest of Cæsar, to the permanent ascendancy of the Norman arms, laws, and manners.

Our Saxon ancestors, who, after their unjust expulsion of the ancient Britons, set-

(*b*) "Et penitus toto divisos orbe Britannos."
VIRG. Ec. 1.

tled

tled themselves in the fairest possessions of this island, were disposed to improve, by the arts of peace, the territory they had acquired by the violence of war, and retained the free spirit, while they gradually lost the ferocious character of the German tribes, whose manners and institutions are so expressively delineated by the pen of of Tacitus (*i*).

By the wisdom and the patriotism of Alfred the Great, the Saxon customs were improved into a system of policy, the remains of which display the just pretensions of that amiable monarch to the grateful memory of Englishmen. The institutions of Alfred were impregnated with those genuine principles of legislation which assist and expand with the progressive improvements of a state, and a subsequent age might have seen the free model of the Anglo-Saxon

(*i*) " De Mor. Germ."

jurisprudence, adorned with the cultivated reason of the civil law. It was, however, the fate of our country, that its political liberties should be surrendered to the shackles of the feudal system, that the possessions of its inhabitants should become a prey to the rapacity of foreign mercenaries, and that the barbarous pomp of military pride should oppress, and spurn, the efforts and the blessings of industry and peace.

The sanguinary violence which often attends the heat of conquest may be deplored, but its deliberate and more lasting injuries are inflicted on the laws of a vanquished people: the simple and equitable principles of jurisprudence which were ripening to perfection among our Saxon progenitors, were soon perplexed by the subtilties, and vitiated by the chicane, of the Norman lawyers (*k*): corruption and

(*k*) "Legibus tantum et moribus Normannicis omnia subsellia strepebant." CRAGII Jus Feudale, l. 1.

partiality

partiality began to disgrace the tribunals of Britain; and while the conqueror affected to reign in the name of the law (*l*), himself and his followers placed their visible dependance on the power of the sword (*m*).

These

(*l*) Sir Matthew Hale (Hist. Com. Law, c. 5.) and Sir William Blackstone (Com. vol. 2. p. 48—52.) have laboured to prove that the conquest of England by William the First, is not to be understood in the military sense of the term, but as synonymous with legal acquisition or purchase. This construction has derived a feeble support from the equivocal use of the word *conquestus*, the vague pretensions of title to the crown on the part of the Norman duke, and his affected solicitude to restore the Saxon institutions; but it is clearly repugnant to the plain facts of that period of our history. See Hume's Hist. vol. 1. p. 282—284.

(*m*) At the distance of more than two centuries from the Norman conquest, and in the reign of a prince (Edward I.) whose improvement of our law has procured him the appellation of the English Justinian, this *iron* evidence of title was produced by the celebrated Earl Warrenne, and with a *prudent* acquiescence on the part of the monarch. Hume's Hist. vol.

These were the severest and most humiliating marks of the subjugation of our country by the victorious Normans. The feudal laws which they introduced, and the inauspicious fluctuations of an unsettled government, restrained for many centuries the progress of British commerce and manufactures: these obstructions were at length removed, and the first signal for the commercial prosperity and civil stability of this kingdom was the abolition of the feudal tenures (*n*). Some exceptionable features of that system are undoubtedly yet visible in the abstruser parts of our jurisprudence; but the wisdom of gradual reform is preferable to the rage of extirpation, and it was perhaps impracticable to extract, without violence, every fibre

vol. 2. p. 238.—A similar *explanation* was given to Robert Bruce, King of Scotland, by some of his nobles: see Robertson's Hist. Scot. vol. 1. p. 48.

(*n*) 12th of Charles the Second, chap. 24.

of

of a root that had struck so deeply, and spread so widely in the soil of Britain.

The event (*o*) by which our constitution was settled, and our civil rights properly defined and secured, is to be regarded as another and still more important æra in the history of our commerce: since that memorable period, a vast and increasing accession of external and internal trade has demanded the solicitude of the legislature, and amplified the jurisdiction of our legal tribunals. The various laws which have taken every species of commercial property under protection; the luminous arguments and solemn decisions by which the sense and spirit of those laws have been applied to the transactions of men, form a system of jurisprudence that we cannot comtemplate without gratitude, and respect. It must also be recollected that,

(*o*) Accession of William the Third.

as the benefit of the law is felt in its administration, great encomium is due to the wisdom and integrity of the judge: he is the living organ of the law, and on his intelligent and upright interpretation of its precepts much of the welfare of the community depends: there is, consequently, no department of science in which excellence more deserves to be applauded; and such names as HOLT, HARDWICKE, and MANSFIELD, will continue to be illustrious, while the able and impartial distribution of justice shall be thought an honour to the tribunals of a nation.

In an age that has so peculiarly witnessed the pompous, but futile and disastrous pretensions of speculative policy, Englishmen need not be exhorted duly to estimate laws which include the soundest maxims of moral experience, and the juridical talents and probity that secure the efficacy of their application to the concerns of life.

AN

AN ESSAY ON THE LAW OF BAILMENTS.

HAVING lately had occasion to examine with some attention the nature and properties of that contract, which lawyers call BAILMENT, or *A delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose, for which they were bailed, shall be answered*, I could not but observe with surprise, that a title in our ENGLISH law, which seems the most generally in-

teresting, should be the least generally understood, and the least precisely ascertained. Hundreds and thousands of men pass through life, without knowing, or caring to know, any of the numberless niceties which attend our abstruse, though
[2] elegant, system of real property, and without being at all acquainted with that exquisite logic, on which our rules of special pleading are founded: but there is hardly a man of any age or station, who does not every week, and almost every day, contract the obligations or acquire the rights of a *hirer*, or a *letter to hire*, of a *borrower* or a *lender*, of a *depositary* or a person *depositing*, of a *commissioner* or an *employer*, of a *receiver* or a *giver*, in *pledge*; and what can be more absurd, as well as more dangerous, than frequently to be bound by duties without knowing the nature or extent of them, and to enjoy rights of which we have no just idea? Nor must

must it ever be forgotten, that the contracts above-mentioned are among the principal springs and wheels of civil society; that, if a want of mutual confidence, or any other cause, were to weaken them or obstruct their motion, the whole machine would instantly be disordered or broken to pieces: preserve them, and various accidents may still deprive men of happiness; but destroy them, and the whole species must infallibly be miserable. It seems, therefore, astonishing that so important a branch of jurisprudence should have been so long and so strangely unsettled in a great commercial country; and that, from the reign of ELIZABETH to the reign of ANNE, *the doctrine of bailments* should have produced more contradictions and confusion, more diversity of opinion and inconsistency of argument, than any other part, [3] perhaps, of juridical learning; at least, than any other part equally simple.

Such being the case, I could not help imagining that a short and perspicuous discussion of this title, an exposition of all our ancient and modern decisions concerning it, an attempt to reconcile judgments apparently discordant, and to illustrate our laws by a comparison of them with those of other nations, together with an investigation of their true spirit and reason, would not be wholly unacceptable to the student of *English* law; especially as our excellent BLACKSTONE, who of all men was best able to throw the clearest light on this, as on every other subject, has comprised the whole doctrine in three paragraphs, which, without affecting the merit of his incomparable work, we may safely pronounce the least satisfactory part of it; for he represents *lending* and *letting to hire*, which are *bailments* by his own definition, as contracts of *a distinct species*; he says nothing of employment by *commission*;

mission; he introduces the doctrine of a *distress*, which has an analogy to a *pawn*, but is not properly *bailed*; and on the great question of *responsibility for neglect*, he speaks so loosely and indeterminately, that no fixed ideas can be collected from his words [*a*]. His Commentaries are the most correct and beautiful outline that ever was exhibited of any human science; but [4] they alone will no more form a lawyer, than a general map of the world, how accurately and elegantly soever it may be delineated, will make a geographer: if, indeed, all the titles, which he professed only to sketch in elementary discourses, were filled up with exactness and perspicuity, *Englishmen* might hope, at length,

[*a*] 2 Comm. 452, 453, 454. (1)

(1) See Christian's Edit. Black. Com. vol. 2. p. 453, note (11), where the learned commentator's inaccuracy on the subject is also admitted, and where a just encomium is given to the elegance, the liberal learning, and the sound law of this Essay.

to

to possess a digest of their laws, which would leave but little room for controversy, except in cases depending on their particular circumstances; a work which every lover of humanity and peace must anxiously wish to see accomplished. The following Essay (for it aspires to no higher name) will explain my idea of supplying the omissions, whether designed or involuntary in the Commentaries on the Laws of ENGLAND.

Subject proposed.

I propose to begin with treating the subject *analytically*, and, having traced every part of it up to the first principles of natural reason, shall proceed, *historically*, to show with what perfect harmony those principles are recognised and established by other nations, especially the ROMANS, as well as by our ENGLISH courts, when their decisions are properly understood and clearly distinguished; after which I shall resume

resume *synthetically* the whole learning of *bailments*, and expound such rules as, in my humble apprehension, will prevent any farther perplexity on this interesting title, except in cases very peculiarly circumstanced.

[5]
I. Analysis.

From the obligation, contained in the definition of bailment, *to restore the thing bailed at a certain time*, it follows that the bailee must *keep* it, and be *responsible* to the bailor *if it be lost or damaged:* but, as the bounds of justice would, in most cases, be transgressed, if he were made answerable for the loss of it *without his fault*, he can only be obliged to keep it with a degree of *care proportioned to the nature of the bailment;* and the investigation of this *degree* in every particular contract is the problem, which involves the principal difficulty.

There

There are infinite shades of *care* or *diligence* from the slightest momentary thought, or transient glances of attention, to the most vigilant anxiety and solicitude; but *extremes* in this case, as in most others, *are inapplicable to practice:* the first extreme would seldom enable the bailee to perform the condition, and the second ought not in justice to be demanded; since it would be harsh and absurd to exact the same anxious care, which the greatest miser takes of his treasure, from every man who borrows a book or a seal. The degrees then of care, for which we are seeking, must lie somewhere between these extremes; and, by observing the different manners and characters of men, we may find a certain standard, which will greatly facilitate our inquiry; for, although some are excessively careless, and others excessively vigilant, and some through life, others
[6] only at particular times, yet we may perceive,

ceive, that *the generality of rational men* use nearly the same degree of diligence in the conduct of *their own* affairs; and this care, therefore, which *every person of common prudence and capable of governing a family* takes of *his own* concerns, is a proper measure of that which would uniformly be required in performing every contract, if there were not strong reasons for *exacting* in some of them a *greater*, and *permitting* in others a *less*, degree of attention. Here then we may fix a constant determinate point, on each side of which there is a series consisting of variable terms tending indefinitely towards the above-mentioned extremes, in proportion as the case admits of indulgence or demands rigour: if the construction be *favourable*, a degree of care *less* than the standard will be sufficient; if *rigorous*, a degree *more* will be required; and, in the first case, the measure will be that care which *every man of common sense, though absent and*

inattentive, applies to his own affairs; in the second, the measure will be that attention which a man *remarkably exact and thoughtful* gives to the securing of his personal property.

The fixed mode or standard of diligence I shall (for want of an apter epithet) invariably call ORDINARY; although that word is equivocal, and sometimes involves a notion of degradation, which I mean wholly to exclude; but the unvaried use
[7] of the word in one sense will prevent the least obscurity. The degrees on each side of the standard, being indeterminate, need not be distinguished by any precise denomination: the first may be called LESS, and the second MORE, THAN ORDINARY diligence.

Superlatives are exactly true in mathematics; they approach to truth in abstract morality; but in practice and actual life they

they are commonly false; they are often, indeed, used for mere *intensives*, as *the* MOST *diligent* for VERY *diligent* (2); but this is a rhetorical figure; and as Rhetoric, like her sister Poetry, delights in fiction, her language ought never to be adopted in sober investigations of truth: for this reason I would reject from the present inquiry, all such expressions as *the utmost care*, *all possible* or *all imaginable diligence*, and the like, which have been the cause of many errors in the code of ancient ROME, whence, as it will soon be demonstrated, they have been introduced into our books even of high authority.

Just in the same manner, there are infinite shades of *default* or *neglect*, from the slightest inattention or momentary absence of mind, to the most reprehensible supineness and stupidity: these are the omissions

(2) See Vinnius in Instit. lib. 3. tit. 15.

of the before-mentioned degrees of diligence, and are exactly correspondent with them. Thus the omission of that care, *which every prudent man takes of his own property*, is the determinate point of negligence, on each side of which is a series
[8] of variable modes of default infinitely diminishing, in proportion as their opposite modes of care infinitely increase; for the want of extremely great care is an extremely little fault, and the want of the slightest attention is so considerable a fault, that it almost changes its nature, and nearly becomes in theory, as it exactly does in practice, a breach of trust, and a deviation from common honesty. This known, or fixed, point of negligence is therefore a mean between *fraud* and *accident*; and, as the increasing series continually approaches to the first extreme, without ever becoming precisely equal to it, until the last term melts into it or vanishes, so the decreasing series

series continually approximates to the second extreme, and at length becomes nearer to it than any assignable difference: but the last terms being, as before, excluded, we must look within them for modes applicable to practice; and these we shall find to be the omissions of such care as *a man of common sense, however inattentive*, and of such as a *very cautious and vigilant* man, respectively take of *their own possessions*.

The constant, or fixed mode of *default* I likewise call ORDINARY, not meaning by that epithet to diminish the culpability of it, but wanting a more apposite word, and intending to use this word uniformly in the same sense; of the two variable modes the first may be called GREATER, and the second LESS, THAN ORDINARY; [9] or the first GROSS, and the other SLIGHT, neglect.

It

It is obvious that a bailee of common honesty, if he also have common prudence, would not be *more* negligent *than ordinary* in keeping the thing bailed: such negligence (as we before have intimated) would be a violation of good faith, and a proof of an intention to defraud and injure the bailor.

It is not less obvious, though less pertinent to the subject, that infinite degrees of *fraud* may be conceived increasing in a series from the term where *gross neglect* ends, to a term where positive *crime* begins ; as *crimes* likewise proceed gradually from the lightest to the most atrocious; and in the same manner, there are infinite degrees of *accident*, from the limit of extremely slight neglect to a *force irresistible* by any human power. Law, as a practical science, cannot take notice of melting lines, nice discriminations, and eva-

evanescent quantities; but it does not follow, that *neglect*, *deceit*, and *accident* are to be considered as indivisible points, and that *no degrees whatever* on either side of the standard are admissible in legal disquisitions.

Having discovered the several modes of *diligence* which may justly be demanded of contracting parties, let us inquire in what particular cases a bailee is by natural law bound to use them, or to be answerable for the omission of them.

When the contract is *reciprocally beneficial to both parties*, the obligation hangs in an even balance; and there can be no reason to recede from the standard: nothing more, therefore, ought in that case to be required than *ordinary diligence*, and the bailee should be responsible for no more than *ordinary neglect*: but it is very [10] different,

different, both in reason and policy, when *one* only of the contracting parties derives advantage from the contract.

If the *bailor only* receive benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the *bailee*, who ought not to be molested unnecessarily for his obliging conduct: if more, therefore, than *good faith* were exacted from such a person, that is, if he were to be made answerable for less than *gross* neglect, few men, after one or two examples, would accept goods on such terms, and social comfort would be proportionably impaired.

On the other hand, when the *bailee alone* is benefited or accommodated by his contract, it is not only reasonable, that he *who receives the benefit should bear the burden*, but if he were not obliged to be

more

more than ordinarily careful, and bound to answer even for *slight* neglect, few men (for acts of pure generosity and friendship are not here to be supposed) would part with their goods for the mere advantage of another, and much convenience would consequently be lost in civil society.

[11]

This distinction is conformable not only to natural reason, but also, by a fair presumption, to the *intention of the parties*, which constitutes the genuine law of all contracts, when it contravenes no maxim of morals or good government; but, when a different intention is *expressed*, the rule (as in devises) yields to it; and a bailee without benefit may, by a special undertaking, make himself liable for *ordinary*, or *slight* neglect, or even for inevitable *accident:* hence, as an agreement, *that a man may safely be dishonest*, is repugnant to decency and morality, and as no man

shall be *presumed* to bind himself against *irresistible force*, it is a just rule that *every* bailee is responsible for *fraud*, even *though* the contrary be stipulated, but that *no* bailee is responsible for *accident*, *unless* it be most expressly so agreed.

II. The history.

The plain elements of natural law, on the subject of responsibility for neglect, having been traced by this short analysis, I come to the second, or *historical* part of my Essay; in which I shall demonstrate, after a few introductory remarks, that a perfect harmony subsists on this interesting branch of jurisprudence in the codes of nations most eminent for legal wisdom, particularly of the ROMANS and the ENGLISH.

Jewish and Athenian law.

Of all known laws the most ancient and venerable are those of the JEWS; and among the *Mosaic* institutions we have some

some curious rules on the very subject before us; but, as they are not numerous [12] enough to compose a system, it will be sufficient to interweave them as we go along, and explain them in their proper places; for a similar reason, I shall say nothing here of the Attic laws on this title, but shall proceed at once to that nation by which the wisdom of ATHENS was eclipsed, and her glory extinguished.

Roman law

The decisions of the old *Roman* lawyers, collected and arranged in the sixth century by the order of JUSTINIAN, have been for ages, and in some degree still are, in bad odour among *Englishmen:* this is an honest prejudice, and flows from a laudable source: but a prejudice, most certainly, it is, and, like all others, may be carried to a culpable excess.

The constitution of ROME was originally excellent; but when it was *settled*, as historians

torians write, *by* AUGUSTUS, or, in truer words, when that base dissembler and cold-blooded assassin *C. Octavius* (3) gave law to millions of honester, wiser, and braver men than himself by the help of a profligate army and an abandoned senate, the new form of government was in itself absurd and unnatural; and the *lex regia* (4), which concentrated in the prince all the powers of the state, both executive and legislative, was a tyrannous ordinance, with the name only, not the nature, of a law [*b*]: had it even been voluntarily conceded, as it was in truth forcibly ex-

[*b*] D. 1. 4. 1.

(3) Our author's antipathy to the character of Augustus is also pointedly expressed in a letter to Mr. Gibbon (Gibb. Post. Works); and a principal cause there assigned, namely, the death of Cicero, does equal honour to his sensibilities as a patriot and a man of genius.

(4) See Vinn. in Instit. lib. 1. tit. 2. and Gibbon's Dec. and Fall Rom. Emp. 8vo. edit. vol. 8. c. 44. p. 17. 49.

torted.

torted, it could not have bound the *sons* of those who consented to it; for "a renunciation of *personal* rights, especially "rights of the highest nature, can have "no operation beyond the *persons* of those "who renounce them" (5). Yet, iniquitous and odious as the *settlement* of the constitution was, ULPIAN only spoke in

(5) The unqualified adoption of this principle may seem to reflect on the prudence of the learned and eloquent author of the Essay; but though constitutional freedom numbered him among her warmest and ablest advocates, there should not be a suspicion that this amiable man, and accomplished scholar, ever entertained a wish to encourage the turbulence of sedition by the sanction of his opinions.—Since the time when the Essay was written, Europe has been agitated by a series of unparalleled revolutionary explosions, some of which have been equally fatal to the safety of the prince, and that of the philosopher: such, indeed, has been the recent and licentious abuse of many expressions, used by eminent writers for the purest purposes of liberty, that LOCKE and Sir WILLIAM JONES would, perhaps, now deem it necessary to guard their political doctrines from being perverted by the mischievous construction of visionary or artful demagogues.

conform-

conformity to it when he said that "the "will of the prince had the force of law;" that is, as he afterwards explains himself, *in the* ROMAN *empire;* for he neither meaned, nor could be mad enough to mean, that the proposition was just or true as a general maxim. So congenial, however, was this rule or sentence, ill understood and worse applied, to the minds of our early NORMAN kings, that some of them, according to Sir JOHN FORTESCUE, "were not pleased with their own "laws, but exerted themselves to intro-"duce the civil laws of *Rome* into the "government of ENGLAND [*c*];" and so hateful was it to our sturdy ancestors, that, if JOHN of SALISBURY be credited, "they "burned and tore all such books of ci-"vil and canon law as fell into their "hands [*d*]:" but this was intemperate

[*c*] *De* Laud. Leg. Angl. c. 33. 34.
[*d*] Seld. *in* Fort. c. 33.

zeal;

zeal; and it would have been sufficient to improbate the *public*, or *constitutional* maxims of the *Roman* imperial law, as absurd in themselves as well as inapplicable to our free government, without rejecting the whole system of *private* jurisprudence as incapable of answering even the purpose of illustration. Many *positive* institutions of the *Romans* are demonstrated by FORTESCUE, with great force, to be far surpassed in justice and sense by our own immemorial customs; and the rescripts of SEVERUS or CARACALLA, which were laws, it seems, at *Rome*, have certainly no kind of authority at *Westminster*; but, in questions of *rational* law, no cause can be assigned, why we should not shorten our own labour by resorting occasionally to the wisdom of ancient jurists, many of whom were the most ingenious and sagacious of men. What is good sense in one age

Distinction between the *private* and *public*, the *rational* and *positive* laws of Rome.

[14]

age must be good sense, all circumstances remaining, in another; and pure unsophisticated reason is the same in ITALY and in ENGLAND, in the mind of a PAPINIAN and of a BLACKSTONE.

Without undertaking, therefore, in all instances, to reconcile NERVA with PROCULUS, LABEO with JULIAN, and GAIUS either with CELSUS or with himself, I shall proceed to exhibit a summary of the *Roman* law on the subject of *responsibility for neglect*.

Two famous laws of Ulpian.

The two great sources, whence all the decisions of civilians on this matter must be derived, are *two* laws of ULPIAN; the first of which is taken from his work on *Sabinus*, and the second from his tract on the Edict: of both these laws I shall give a verbal translation according to my apprehension

prehension of their obvious meaning, and shall then state a very learned and interesting controversy concerning them, with the principal arguments on each side, as far as they tend to elucidate the question before us.

" Some contracts, says the great writer " on *Sabinus*, make the party responsible " for DECEIT ONLY; some, for both DE- " CEIT AND NEGLECT. Nothing more " than *responsibility for* DECEIT *is demanded* " in DEPOSITS and POSSESSION AT WILL; " both DECEIT AND NEGLECT *are inhibited* " in COMMISSIONS, LENDING FOR USE, " CUSTODY AFTER SALE, TAKING IN " PLEDGE, HIRING; also in PORTIONS, " GUARDIANSHIPS, VOLUNTARY WORK: " (among these SOME *require* even *more* " *than ordinary* DILIGENCE.) PARTNER- " SHIP and UNDIVIDED PROPERTY make " *the partner and joint-proprietor* answer- " able

" able for both DECEIT AND NEGLI-
" GENCE [*e*]."

" In contracts, says the same author in
" his other work, we are sometimes re-
" sponsible for DECEIT ALONE; some-
" times for NEGLECT ALSO; for DECEIT
[16] " ONLY in DEPOSITS; because, since NO
" BENEFIT accrues to the depositary, he
" can justly be answerable for no more
" than DECEIT; but if a REWARD happen
" to be given, then *a responsibility for* NE-
" GLECT ALSO is required; or, if it be
" agreed at the time of the contract, that
" the depositary shall answer both for NE-
" GLECT and for ACCIDENT: but, where

[*e*] Contractûs quidam DOLUM malum DUNTAXAT recipiunt; quidam, et DOLUM ET CULPAM. DOLUM tantùm DEPOSITUM et PRECARIUM; DOLUM ET CULPAM, MANDATUM, COMMODATUM, VENDITUM, PIGNORI ACCEPTUM, LOCATUM; item DOTISDATIO, TUTELÆ, NEGOTIA GESTA: (in his QUIDAM et DILIGENTIAM). SOCIETAS et RERUM COMMUNIO et DOLUM ET CULPAM recipit. D. 50. 17. 23.

" A BE-

" A BENEFIT accrues to BOTH parties, " as in KEEPING A THING SOLD, as " in HIRING, as in PORTIONS, as in " PLEDGES, as in PARTNERSHIP, both " DECEIT AND NEGLECT make the party " liable. LENDING FOR USE, indeed, is " for the most part BENEFICIAL to the " BORROWER ONLY; and, for this rea- " son, the better opinion is that of *Q.* " *Mucius*, who thought, that HE should " be responsible not only for NEGLECT, " but even for the omission of *more than* " *ordinary* DILIGENCE [*f*]."

One

[*f*] In contractibus interdum DOLUM SOLUM, interdum ET CULPAM, præstamus; DOLUM in DEPOSITO; nam, quia NULLA UTILITAS ejus versatur, apud quem deponitur, merito DOLUS præstatur SOLUS; nisi fortè et MERCES accessit, tunc enim, ut est et constitutum, ETIAM CULPA exhibetur; aut, si hoc ab initio convenit, ut et CULPAM et PERICULUM præstet is, penes quem deponitur: sed, ubi UTRIUSQUE UTILITAS vertitur, ut in EMPTO, ut in LOCATO ut in DOTE, ut in PIGNORE, ut in SOCIETATE, et DOLUS ET CULPA præstatur. COMMODATUM autem plerumque SOLAM UTILITATEM continet ejus, CUI COMMODATUR; et ideò verior est *Q.* MUCII

Critical remarks.

One would scarce have believed it possible, that there could have been two opinions on laws so perspicuous and precise, composed by the same writer, who was indubitably the best expositor of his own doctrine, and apparently written in illustration of each other; the first comprising the rule, and the second containing the reason of it: yet the single passage extracted from the book on *SABINUS* has had no fewer than twelve particular commentaries in *Latin* [*g*], one or two in *Greek* [*h*], and some in the *modern* languages of *EUROPE*, besides the general expositions of

MUCII ſententia exiſtimantis et CULPAM præſtandam et DILIGENTIAM. D. 13. 6. 5. 2. (6)

[*g*] BOCERUS, CAMPANUS, D'AVEZAN, DEL RIO, LE CONTE, RITTERSHUSIUS, GIPHANIUS, J. GODEFROI, and others.

[*h*] The ſcholium on *Harmenopulus*, l. 6. tit. de Reg. Jur. n. 55. may be conſidered as a commentary on this law.

(6) See Domat. Civ. Law, lib. 1. tit. 1. § 3. and Vinn. in Inſtit. lib. 3. tit. 15.

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that important part of the digest, in which it is preserved. Most of these I have perused with more admiration of human sagacity and industry than either solid instruction or rational entertainment; for these authors, like the generality of commentators, treat one another very roughly on very little provocation, and have the art rather of clouding texts in themselves clear, than of elucidating passages, which have any obscurity in the words or the sense of them. *CAMPANUS*, indeed who was both a lawyer and a poet, has turned the first law of *Ulpian* into *Latin* hexameters; and his authority, both in prose and [18] verse, confirms the interpretation which I have just given.

The chief causes of all this perplexity have been, first, the vague and indistinct manners in which the old *Roman* lawyers, even the most eminent, have written on the

the subject; secondly, the loose and equivocal sense of the words *DILIGENTIA* and *CULPA*; lastly and principally, the darkness of the parenthetical clause *IN HIS QUIDAM ET DILIGENTIAM*, which has produced more doubt, as to its true reading and signification, than any sentence of equal length in any author *Greek* or *Latin*. Minute as the question concerning this clause may seem, and dry as it certainly is, a short examination of it appears absolutely necessary.

The vulgate editions of the Pandects, and the manuscripts from which they were printed, exhibit the reading above set forth; and it has accordingly been adopted by *CUJAS*, *P. FABER*, *LE CONTE*, *DONELLUS*, and *most* others, as giving a sense both perspicuous in itself and consistent with the second law; but the *FLORENTINE* copy has *quidem*, and the copies from which

which the *Basilica* were translated three centuries after *JUSTINIAN*, appear to have contained the same word, since the *Greeks* have rendered it by a particle of similar import. This variation in a single letter makes a total alteration in the whole doctrine of *ULPIAN*; for, *if* it be agreed, that *diligentia* means, by a figure of speech, *a more than ordinary degree of diligence*, [19] the common reading will imply, conformably with the second law before cited, that "SOME of the preceding contracts demand "that higher degree;" but the *Florentine* reading will denote, in contradiction to it, that "ALL of them require more than "ordinary exertions."

It is by no means my design to depreciate the authority of the venerable manuscript preserved at *Florence*; for although few civilians, I believe, agree with *POLITIAN*, in supposing it to be one of the *originals*,

originals (7), which were sent by *Justinian* himself to the principal towns of *Italy* [*i*], yet it may *possibly* be the very book, which the Emperor *Lotharius* II. is *said* to have found at *Amalfi* about the year 1130, and gave to the citizens of *Pisa*, from whom it was taken near three hundred years after, by the *Florentines*, and has been kept by them with superstitious reverence [*k*]: be that as it may, the copy deserves the highest respect; but if any proof be requisite, that it is *no faultless* transcript, we may observe, that, in the very law before us, *accedunt* is erroneously written for *accidunt;* and the whole phrase, indeed, in which that word occurs, is different from the copy used by the *Greek*

[*i*] Epist. x. 4. Miscell. cap. 41. See Gravina, lib. i. § 141.

[*k*] Taurelli, Præf. ad Pand. Florent.

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(7) See Gibbon's Dec. and Fall Rom. Emp. 8vo. edit. vol. 8. c. 44. p. 44, 45 and notes.

inter-

interpreters, and conveys a meaning, as *Bocerus* and others have remarked, not [20] supportable by any principle or analogy.

This, too, is indisputably clear; that the sentence, *in his QUIDEM et diligentiaM*, is ungrammatical, and cannot be construed according to the interpretation, which some contend for. What verb is understood? *Recipiunt.* What noun? *Contractis.* What then becomes of the words *in his*, namely *contractibus*, unless *in* signify *among?* And in that case, the difference between *QUIDEM* and *QUIDAM* vanishes; for the clause may still import, that "AMONG the preceding contracts "(that is, *in* SOME *of them*) more than "usual diligence is exacted:" in this sense the *Greek* preposition seems to have been taken by the scholiast on *HARMENOPULUS*; and it may here be mentioned, that *diligentia*, in the nominative, appears in some

old copies, as the *Greeks* have rendered it; but *Accursius*, *Del Rio*, and a few others, consider the word as implying no more than diligence *in general*, and distinguish it into various *degrees* applicable to the several contracts, which *Ulpian* enumerates. We may add, that one or two interpreters thus explain the whole sentence, "in his *contractibus* quidam *ju-*
"*risconsulti* et diligentiam *requirunt:*" but this interpretation, if it could be admitted, would entirely destroy the authority of the clause, and imply, that *Ulpian* was of a different opinion. As to the last conjecture, that only *certain cases* and *circum-*
[21] *stances* are meaned by the word *QUIDAM*, it scarce deserves to be repeated. On the whole, I strongly incline to prefer the vulgate reading, especially as it is not conjectural, but has the authority of manuscripts to support it; and the mistake of a letter might easily have been made by

by a transcriber, whom the prefaces, the epigram prefixed, and other circumstances, prove to have been, as *Taurelli* himself admits, a *Greek* (8). Whatever, in short, be the genuine words of this much-controverted clause (9), I am persuaded, that it ought by no means to be strained into an inconsistency with the *second* law; and

(8) See Gibbon's Rom. Emp. vol. 8. p. 44. note 87.

(9) Few verbal controversies have been equally important with that on the construction of the disputed sentence in Ulpian's commentary; for though the preponderancy of any of the various opinions urged on the subject, may have little or no influence on the settled maxims of our law, it must be obvious that the accuracy of the decision is materially connected with the clearness and arrangement of the general doctrine of Bailments: as the Roman jurisprudence is the source from which this general doctrine is derived, the learned and liberal lawyer will acknowledge considerable obligation to Sir William Jones for the acute and well-supported reasoning, by which he establishes the true reading of the clause, ("in his quidam et diligentiam,") in opposition to fanciful conjecture, and dogmatical assertion.

this has been the opinion of *most* foreign jurists from *Azo* and *Alciat* down to *Heineccius* and *Huber*; who, let their dissension be, on other points, ever so great, think alike in distinguishing *three degrees* of neglect, which we may term *gross*, *ordinary*, and *slight*, and in demanding responsibility for those degrees according to the rule before expounded.

The law, then, on this head, which prevailed in the ancient *Roman* empire, and still prevails in *Germany*, *Spain*, *France*, *Italy*, *Holland*, constituting, as it were, a part of the law of nations, is in substance what follows.

Definitions and rules.

Gross neglect, *lata culpa*, or, as the *Roman* lawyers most accurately call it, *dolo proxima*, is in practice considered as equivalent to DOLUS, or FRAUD, itself; and consists, according to the best interpreters,

preters, in the *omission* of that care, *which even inattentive and thoughtless men never fail to take of their own property:* this [22] fault they justly hold a violation of *good faith.*

ORDINARY neglect, *levis culpa*, is the *want* of that diligence which the *generality of mankind use in their own concerns;* that is, of *ordinary care.*

SLIGHT neglect, *levissima culpa*, is the *omission* of that care which *very attentive and vigilant persons take of their own goods*, or, in other words, of *very exact diligence.*

Now, in order to ascertain the degree of neglect, for which a man, who has in his possession the goods of another, is made responsible by his contract, either *express* or *implied*, civilians establish *three* principles, which they deduce from the law of

Ulpian

Ulpian on the *Edict*; and here it may be observed, that they frequently distinguish this law by the name of *Si ut certo*, and the other by that of *Contractus* [*l*]; as many poems and histories in ancient languages are denominated from their *initial* words.

First: In contracts, which are beneficial *solely* to the owner of the property holden by another, no more is demanded of the holder than *good faith*, and he is consequently responsible for nothing less than *gross* neglect: this, therefore, is the general rule in DEPOSITS; but, in regard to COMMISSIONS, or, as foreigners call them,

[*l*] Or l. 5. § 2. ff. *Commod.* and l. 23. ff. *de reg. jur.* Inſtead of *ff*, which is a barbarous corruption of the initial letter of πανδέκται, many write D, for *Digest*, with more clearneſs and propriety (10).

(10) See Gibbon's Rom. Emp. vol. 8. p. 2. note 1, for an obvious improvement on the old and confuſed manner of referring to the civil law.

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MANDATES, and the *implied* contract *negotiorum gestorum*, a certain care is requisite from *the nature of the thing*; and as *good faith* itself demands, that such care be proportioned to the exigence of each particular case, the law *presumes*, that the mandatary or commissioner, and, by parity of reason, the *negotiorum gestor*, engaged at the time of contracting to use a degree of diligence *adequate to the performance of the work undertaken* [*m*].

Secondly: In contracts *reciprocally* beneficial to *both* parties, as in those of SALE, HIRING, PLEDGING, PARTNERSHIP, and the contract implied in JOINT-PROPERTY, such care is exacted as *every prudent man commonly takes of his own goods*; and, by consequence, the *vendor*, the *hirer*, the *taker in pledge*, the *partner*, and the *co-proprietor*, are answerable for *ordinary* neglect.

[*m*] *Spondet diligentiam*, say the *Roman* lawyers, *gerendo negotio parem.*

Thirdly:

Thirdly: In contracts, from which a benefit accrues *only* to him who has the goods in his custody, as in that of LENDING FOR USE, an *extraordinary* degree of care is demanded; and the *borrower* is, therefore responsible for *slight* negligence.

This had been the learning generally, and almost unanimously, received and taught by the doctors of *Roman* law; and it is very remarkable, that even *Antoine Favre*, or *Faber*, who was famed [24] for innovation and paradox, who published two ample volumes *De Erroribus Interpretum*, and whom *Gravina* justly calls *the boldest of expositors and the keenest adversary of the practisers* [n], discovered no error

[n] Orig. Jur. Civ. lib. i. § 183. (11)

(11) The whole of Gravina's animadversion deserves to be quoted for the implied and salutary lesson it offers to the juvenile Quixotes, whose paradoxical weapons are frequently displayed with such exulting confi-

error in the common interpretation of two celebrated laws, which have so direct and so powerful an influence over social life, and which he must repeatedly have considered: but the younger *Godefroi* of *Geneva*, a lawyer confessedly of eminent learning, who died about the middle of the last century, left behind him a regular *commentary* on the law *Contractus*, in which he boldly combats the sentiments of all his predecessors, and even of the ancient *Romans*, and endeavours to support a new system of his own.

System of J. Godefroi.

He adopts, in the first place, the *Florentine* reading, of which the student, I

confidence in the field of literary controversy:—"Tandem in Antonio Fabro consistam audacissimo, et pragmaticorum hoste vehementissimo: qui aliis quidem in operibus acumen magis, quam veritatem præstitit; in codice vero suo usum rerum, et ingenii sui jam maturi reddidit nobis utilitatem: *ut meliora sint illius, quæ minus acuta.*"

hope, has formed, by this time, a decided opinion from a preceding page of this Essay.

He censures the rule comprised in the law *Si ut certo* as weak and fallacious, yet admits, that the rule, which He condemns, had the approbation and support of *Modestinus*, of *Paulus*, of *Africanus*, of *Gaius*, and of the great *Papinian* himself; nor does he satisfactorily prove the *fallaciousness* to which he objects, unless every rule be fallacious to which there are some exceptions. He understands by DILIGENTIA, that care which *a very*
[25] *attentive and vigilant man* takes of his own property; and he demands this care in *all* the eight contracts, which immediately precede the disputed clause: in the *two* which follow it, he requires no more than *ordinary* diligence. He admits, however, the *three* degrees of neglect above stated,

stated, and uses the common epithets *levis* and *levissima*; but in order to reconcile his system with many laws, which evidently oppose it, he ascribes to the old lawyers the wildest mutability of opinion, and is even forced to contend, that *ULPIAN* himself *must have changed his mind*.

Since his work was not published, I believe, in his life-time, there may be reason to suspect, that he had not completely settled *his own* mind; and he concludes, indeed, with referring the decision of every case on this head to that most dangerous and most tremendous power, *the discretion of the judge* [o].

Systems of Zasius and Donellus.

The *triple* division of neglects had also been highly censured by some lawyers of

[o] "Ego certè hac in re censentibus accedo, vix "quidquam generaliùs definiri posse; remque hanc ad "*arbitrium judicis*, prout res est, referendam." p. 141.

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reputation. *Zasius* had very justly remarked, that neglects differed in *degree*, but not in *species*; adding, "that he had "no objection to the use of the words "*levis* and *levissima*, merely as terms of "practice adopted in courts, for the more "easy distinction between the different
[26] "degrees of care exacted in the per- "formance of different contracts [*p*]:" but *Donellus*, in opposition to his master *Duaren*, insisted that *levis* and *levissima* differed in sound only, not in sense; and attempted to prove his assertion triumphantly by a regular syllogism [*q*]; the minor proposition of which is raised on the figurative and inaccurate manner, in which positives are often used for superlatives, and conversely, even by the best of the

[*p*] Zas. *Singul. Resp.* lib. i. cap. 2.

[*q*] "Quorum definitiones eædem sunt, ea inter se "sunt eadem; *levis* autem culpæ et *levissimæ* una et "eadem definitio est; utraque igitur culpa eadem." Comm. Jur. Civ. lib. xvi. cap. 7.

old

old *Roman* lawyers. True it is, that, in the law *Contractus*, the division appears to be *twofold* only, DOLUS and CULPA; which differ in *species*, when the first means *actual fraud and malice*, but in *degree* merely when it denotes no more than *gross neglect*; and, in either case, the second branch, being capable of *more* and *less*, may be subdivided into *ordinary* and *slight*; a subdivision which the law *Si ut certo* obviously requires: and thus are both laws perfectly reconciled.

We may apply the same reasoning, changing what should be changed, to the *triple* division of *diligence*; for, when *good faith* is considered as implying at least the exertion of *slight* attention, the other branch, *Care*, is subdivisible into *ordinary* and *extraordinary*; which brings us back to the number of degrees already established both by the analysis and by authority. [27]

Never-

System of Le Brun.

Nevertheless, a system, in one part entirely new, was broached in the present century by an advocate in the Parliament of PARIS, who may, probably, be now living, and, possibly, in that professional station (12). to which his learning and acuteness justly intitle him. I speak of

(12) It is scarcely necessary to inform the reader, that the juridical system to which our author here alludes, and consequently the various departments of its administration, no longer subsist in France. The magisterial situations in the ancient French parliaments or courts of judicature, were notoriously obtained by purchase: history, however, to the honour of the members of the courts in question, records many instances of their spirited resistance to the arbitrary edicts of the "*Grand Monarque*;" and the prophetic penetration of Blackstone (Com. vol. 1. p. 269.) pronounced, that the restoration of Gallic freedom, should it ever take place, would be owing "to the "efforts of those assemblies." This prediction has been strikingly verified; but it cannot be supposed, that the patriotic members of the Parliament of Paris in the least anticipated the singular and furious excesses of moral and political innovation, which their country has within these few years exhibited, to the astonishment of Europe.

M. LE

M. Le Brun, who published, not many years ago, an *Essay on Responsibility for Neglect* [*r*], which he had nearly finished before he had seen the Commentary of *Godefroi*, and, in all probability, without ever being acquainted with the opinion of *Donellus*.

This author sharply reproves the *triple* division of neglects, and seems to disregard the rule concerning a benefit arising to *both*, or to *one*, of the contracting parties; yet he charges *Godefroi* with a want of due clearness in his ideas, and with a palpable misinterpretation of several laws. He reads *in his quidem et diligentiam*; and that with an air of triumph; insinuating, that *quidam* was only an artful conjecture of *Cujas* and *Le Conte*, for the purpose of establishing *their* system; and he supports

[*r*] *Essai sur la Prestation des Fautes*, à Paris, chez Saugrain, 1764.

his

his own reading by the authority of the BASILICA; an authority, which, on another occasion, he depreciates. He derides
[28] the absurdity of *permitting negligence* in any contract, and urges, that such *permission*, as he calls it, is against express law: "now, says he, where a contract is "beneficial to both parties, the doctors "permit *slight* negligence, which, how "slight soever, is still *negligence*, and ought "always to be inhibited." He warmly contends, that the ROMAN laws, properly understood, admit only *two* degrees of diligence; one, measured by that, which *a provident and attentive father of a family* uses in his own concerns; another, by that care, which the *individual party*, of whom it is required, *is accustomed to take of his own possessions;* and he, very ingeniously, substitutes a new rule in the place of that which he rejects; namely, that, *when the things in question are the* SOLE *property of the*

the person to whom they must be restored, the holder of them is obliged to keep them with the *first* degree of diligence; whence he decides, that a *borrower* and a *hirer* are responsible for precisely the same neglect; that a vendor, who retains for a time the custody of the goods sold, is under the same obligation, in respect of care, with a man, who undertakes to manage the affairs of another, either *without* his request as a *negotiorum gestor*, or *with* it, as a *mandatary*: "but," says he, "*when the* "*things are the* JOINT *property of the* "*parties contracting*, no higher diligence "can be required than the second degree, "or that, which the *acting party* com- "monly uses in *his own* affairs; and it "is sufficient, *if he keep them, as he keeps* [29] "*his own.*" This he conceives to be the distinction between the *eight* contracts, which precede, and the *two*, which follow, the words *in his quidem et diligentiam.*

Throughout his work he displays no small sagacity and erudition, but speaks with too much confidence of his own decisions, and with too much asperity or contempt of all other interpreters from BARTOLUS to VINNIUS.

At the time when this author wrote, the learned M. POTHIER was composing some of his admirable *Treatises* on all the different species of express or implied *contracts;* and here I seize, with pleasure, an opportunity of recommending those treatises to the *English* lawyer, exhorting him to read them again and again; for, if his great master LITTLETON has given him, as it must be presumed, a taste for luminous method, apposite examples, and a clear manly style, in which nothing is redundant, nothing deficient, he will surely be delighted with works, in which all those advantages are combined, and the greatest portion

portion of which is law at *Westminster* as well as at *Orleans* [*s*]: for my own part, I am so charmed with them, that, if my undissembled fondness for the study of jurisprudence were never to produce any greater benefit to the public, than barely [30] the introduction of POTHIER to the acquaintance of my countrymen, I should think that I had in some measure discharged the debt, which *every man*, according to Lord COKE (13), *owes to his profession*.

Vindication of the old system by Pothier.

To this venerable professor and judge, for he had sustained both characters with deserved applause, LE BRUN sent a copy of his little work; and M. POTHIER honoured it with a short, but complete, answer

[*s*] *Oeuvres de M. Pothier*, à Paris, chez DEBURE: 28 volumes in *duodecimo*, or 6 in *quarto*. The illustrious author died in 1772.

(13) 8th Rep. pref. p. 34.

in the form of a *General observation on his Treatises* [*t*]; declaring, at the same time, that *he would not enter into a literary contest*, and apologizing for his fixed adherence to the ancient system, which he politely ascribes to *the natural bias of an old man in favour of opinions formerly imbibed.* This is the substance of his answer: "That he "can discover no kind of absurdity in "the usual division of *neglect* and *diligence*, "nor in the *rule*, by which different *de-* "*grees* of them are applied to different "contracts; that, to speak with strict "propriety, negligence is not *permitted* "in any contract, but *a less rigorous con-* "*struction* prevails in some than in others; "that a *hirer*, for instance, is not consi- "dered as *negligent*, when he takes the "same care of the goods hired, which the "generality of mankind take of their own;

[*t*] It is printed apart, in *fourteen* pages, at the end of his Treatise on the *Marriage-Contract.*

"that

" that the *letter to hire*, who has his re-
" ward, must be presumed to have de-
" manded at first no higher degree of [31]
" diligence, and cannot justly complain
" of that *inattention*, which in another
" case might have been culpable; for a
" *lender*, who has *no* reward, may fairly
" exact from the borrower that *extraordi-*
" *nary* degree of care, which *a very at-*
" *tentive person of his age and quality* would
" certainly have taken; that the diligence,
" which *the* INDIVIDUAL *party commonly*
" *uses in his own affairs*, cannot properly
" be the object of judicial inquiry; for
" *every* trustee, administrator, partner, or
" co-proprietor, must be *presumed* by the
" court, auditors, or commissioners be-
" fore whom an account is taken, or a
" distribution or partition made, to use
" in *their own* concerns such diligence, as
" is commonly used by *all prudent men;*
" that it is a violation of *good faith* for
" any

" any man to take less care of another's " property, which has been intrusted to " him, *than of his own;* that consequent- " ly, the author of the new system de- " mands no more of a *partner* or a *joint-* " *owner* than of a *depositary*, who is bound " to keep the goods deposited *as he keeps* " *his own;* which is directly repugnant " to the indisputable an undisputed sense " of the law *Contractus*."

I cannot learn whether M. LE BRUN ever published a reply, but am inclined to believe that his system has gained very little ground in *France*, and that the old
[32] interpretation continues universally admitted on the Continent both by theorists and practisers.

Nothing material can be added to POTHIER'S argument, which in my humble opinion, is unanswerable; but it may not be

be wholly useless to set down a few general remarks on the controversy: particular observations might be multiplied without end.

Observations on Le Brun.

The only *essential* difference between the systems of GODEFROI and LE BRUN relates to the *two* contracts, which follow the much-disputed clause; for the *Swiss* lawyer makes the partner and co-proprietor answerable for *ordinary* neglect, and the *French* advocate demands no more from them than *common honesty;* now, in this respect, the error of the *second* system has been proved to demonstration; and the author of it himself confesses ingenuously, that the other part of it fails in the article of *Marriage-portions* [*u*].

In regard to the division of neglect and care into *three* degrees or *two*, the dispute

[*u*] See p. 71. *note*; and p. 126.

appears

appears to be merely verbal; yet, even on this head, LE BRUN seems to be self-confuted: he begins with engaging to prove "that only *two* degrees of fault "are distinguished by the laws of *Rome*," and ends with drawing a conclusion, that they acknowledge but *one* degree: now, though this might be only a slip, yet the whole tenor of his book establishes *two*
[33] modes of *diligence*, the *omissions* of which are *as many* neglects; exclusively of *gross* neglect, which he likewise admits, for the *culpa levissima* only is that, which he repudiates. It is true, that he gives no epithet or name to the omission of his *second* mode of care; and, had he searched for an epithet, he could have found no other than *gross*; which would have demonstrated the weakness of his whole system [*v*].

[*v*] See pages 32. 73, 74. 149.

The

The disquisition amounts, in fact, to this: from the barrenness or *poverty*, as LUCRETIUS (14) calls it, of the *Latin* language, the single word *CULPA* includes, as a generic term, various degrees or shades of *fault*, which are sometimes distinguished by epithets, and sometimes left without any distinction; but the *Greek*, which is rich and flexible, has a term expressive of almost every shade, and the translators of the law *Contractus* actually use the words ῥᾳθυμία and ἀμέλεια, which are by no means synonymous, the former implying a certain *easiness of mind* or *remissness of attention*, while the second imports a higher and more culpable degree of *negligence* [*w*]. This

[*w*] *Basilica*, 2, 3. 23. See *Demosth.* 3 Phil. *Reiske*'s edit. I. 112. 3. For *levissima culpa*, which occurs but once in the whole body of *Roman* law, ῥᾳθυμία seems the proper word in *Greek*; and it is actually so used in the *Basilica*, 60. 3. 5. where mention is made of the *Aquilian* law, *in quâ*, says ULPIAN, *et levissima culpa venit.* D. 9. 2. 44.

(14) De Rer. Nat. lib. 1. line 140.

observation, indeed, seems to favour the system of *Godefroi;* but I lay no great stress on the mere words of the translation, as I cannot persuade myself, that the *Greek* jurists under BASILIUS and LEO were perfectly acquainted with the niceties and genuine purity of their language; and there are invincible reasons, as, I hope, it has been proved, for rejecting all systems but that, which POTHIER has recommended and illustrated.

English law. I come now to the laws of our own country, in which the same distinctions and the same rules, notwithstanding a few clashing authorities, will be found to prevail; and here I might proceed chronologically from the oldest *Year-book* or *Treatise* to the latest adjudged *Case;* but, as there would be a most unpleasing dryness in that method, I think it better to examine separately every distinct *species* of bailment,

bailment (15), observing at the same time, under each head, a kind of historical order. It must have occurred to the reader, that I might easily have taken a wider field, and have extended my inquiry to every possible case, in which a man *possesses for a time the goods of another;* but I chose to confine myself within certain limits, lest, by grasping at too vast a subject, I should at last be compelled, as it frequently happens, by accident or want of leisure, to leave the whole work unfinished: it will be sufficient to remark, that the rules are in general the same, by whatever means [35] the goods *are legally* in the hands of the possessor, whether by delivery from the owner, which is a proper *bailment*, or from any other person, by finding [x], or in consequence of some distinct contract.

[x] Doct. and Stud. dial. 2. ch. 38. Lord Raym. 909. 917. See Ow. 141. 1 Leon. 224. 1 Cro. 219. *Mulgrave* and *Ogden*.

(15) See Gibbon's Rom. Emp. vol. 8. p. 84. 85, 87.

Lord Holt's division of Bailments.

Sir JOHN HOLT, whom every *Englishman* should mention with respect, and from whom no *English* lawyer should venture to dissent without extreme diffidence, has taken a comprehensive view of this whole subject in his judgment on a celebrated case (16), which shall soon be cited at length; but, highly as I venerate his deep learning and singular sagacity, I shall find myself constrained, in some few instances, to differ from him, and shall be presumptuous enough to offer a correction or two in part of the doctrine, which he propounds in the course of his argument [*y*].

His division of bailments into *six* sorts appears, in the first place, a little inaccurate; for, in truth, his *fifth* sort is no more than a branch of his *third* and he

[*y*] Lord Raym. 912.

(16) Coggs v. Bernard, 2 Lord Raym. 909. See post, p. 58. and the case at full in the Appendix.

might

might, with equal reason, have added a *seventh*, since the fifth is capable of another subdivision. I acknowledge, therefore, but *five* species of bailment; which I shall now enumerate and define, with all the *Latin* names, one or two of which Lord *Holt* has omitted. 1. DEPOSITUM, which is a naked bailment, without reward, of goods to be *kept* for the bailor. 2. MANDATUM, or *commission;* when the mandatary undertakes, without recompence, to *do some act* about the things bailed, or simply to *carry* them; and hence Sir HENRY FINCH divides bailment into *two* sorts, to *keep*, and to *employ* [z]. 3. COMMODATUM, or *loan for use;* when goods are bailed, without pay, to be *used* for a certain time by the bailee. 4. PIGNORI ACCEPTUM; when a thing is bailed by a debtor to his creditor in *pledge*, or as a security for the debt. 5. LOCATUM, or *hiring*, which is

[36]
New division and definitions.

[z] Law, b. 2. ch. 18.

always

always for *a reward;* and this bailment is either, 1. *locatio rei*, by which the hirer gains the temporary use of *the thing;* or, 2. *locatio operis faciendi*, when *work* and *labour*, or *care* and *pains*, are to be performed or bestowed on the thing delivered; or, 3. *locatio operis mercium vehendarum*, when goods are bailed for the purpose of being *carried* from place to place, either to a *public* carrier, or to a *private* person (17).

Law of deposits.

I. The most ancient case, that I can find in our books, on the doctrine of DEPOSITS, (there were others, indeed, a few years earlier, which turned on points of pleading,) was adjudged in the eighth of Edward II. and is abridged by *Fitz-*

(17) This division and classification of the different species of Bailment, will be considered by the student of the English law, as preferable both to Lord Holt's Analysis and the Order of the Imperial Institutes. See Vinnius in Instit. lib. 3. tit. 15.

herbert.

herbert [*a*]. It may be called BONION'S case, from the name of the plaintiff, and was, in substance, this: An action of detinue was brought for *seals*, *plate*, and *jewels*, and the defendant pleaded, "that "the plaintiff had bailed to him a chest "*to be kept*, which chest was *locked*; that "the bailor himself took away the key, "*without informing the bailee of the con-* "*tents;* that robbers came in the NIGHT, "*broke open the defendant's chamber*, and "carried off the chest into the fields, where "they forced the lock, and took out the "*contents;* that the defendant was robbed "at the same time of his own goods." The plaintiff replied, "that the jewels "were delivered, in a chest *not locked*, "to be restored at the pleasure of the "bailor," and *on this*, it is said, *issue was joined.*

[37]
Bonion's case.

[*a*] Mayn. Edw. II. 275. Fitz. Abr. *tit.* Detinue, 59.

Upon

Upon this case Lord *Holt* observes, " that " he cannot see, why the bailee should not " be charged with goods *in* a chest as well " as with goods *out of* a chest ; for, says " he, the bailee has as little power over " them, as to any benefit that he might " have from them, and as great power " to defend them in one case as in the " other [*b*]." The very learned judge was dissatisfied, we see, with Sir *Edward Coke*'s reason, " That, when the jewels " were locked up in a chest, the bailee " was not, in fact, trusted with them [*c*]." Now there was a diversity of opinion, upon
[38] this very point, among the greatest lawyers of *Rome* ; for " it was a question, whe- " ther, if a box sealed up had been de- " posited, the box only should be demand- " ed in an action, or the clothes, which " it contained, should also be specified ;

[*b*] Lord Raym. 914. [*c*] 4 Rep. 84.

" and

" and TREBATIUS insists, that the box " only, not the particular contents of it, " must be sued for; unless the things were " previously shewn, and then deposited: " but LABEO asserts, that he, who depo- " sits the box, deposits the contents of it; " and ought therefore, to demand the " clothes themselves. What then, if the " depositary *was ignorant of the contents?* " It seems to make no great difference, " since he took the charge upon himself; " and I am of opinion, says *Ulpian*, that, " although the box was sealed up, yet an " action may be brought for what it con- " tained [*d*]." This relates chiefly to the form of the libel; but, surely, cases may be put, in which the difference may be very material as to the *defence*. Diamonds, gold, and precious trinkets, ought, *from their nature*, to be kept with peculiar care under lock and key: it would, therefore,

[*d*] D. 16. 3. 1. 41.

be *gross* negligence in a depositary to leave such a deposit in an open antichamber, and *ordinary* neglect, at least, to let them remain on his table, where they might possibly tempt his servants; but no man can proportion his care to the *nature* of things, without knowing them: perhaps, there-
[39] fore, it would be no more than *slight* neglect, to leave out of a drawer a box or casket, which was neither known, nor could justly be suspected, to contain diamonds; and DOMAT (18), who prefers the opinion of *Trebatius*, decides, "that, "in such a case, the depositary would "only be obliged to restore the casket, "as it was delivered, without being re-"sponsible for the contents of it." I confess, however, that, anxiously as I wish on all occasions to see authorities respected, and judgments holden sacred, BONION's case appears to me wholly incomprehen-

(18) Civ. Law, lib. 1. tit. 7. § 1.

sible;

sible; for the defendant instead of having been *grossly* negligent, (which alone could have exposed him to an action,) seems to have used at least *ordinary* diligence; and, after all, the loss was occasioned by a *burglary*, for which no bailee can be responsible without a very special undertaking. The plea, therefore, in this case was good, and the replication, idle; nor could I ever help suspecting a mistake in the last words *alii quòd non;* although *Richard de Winchedon*, or whoever was the compiler of the *table* to this Year-book, makes a distinction, that, "if jewels be "bailed to me, and *I put them* into a "casket, and *thieves rob me of them in the* "*night-time*, I am answerable; not, if "they be *delivered* to me in a chest *sealed* "*up;*" which could never have been law; for the next oldest case, in the book of *Assise*, contains the opinion of Chief Justice THORPE, that "a general bailee *to keep* "is

" is not responsible, *if the goods be stolen*,
[40] " without his *gross* neglect [*e*];" and it appears, indeed, from *Fitzherbert*, that the party was driven to this issue, " whether " the goods were taken away by *robbers*."

Mosaic laws. By the *Mosiac* institutions, " if a man " delivered to his neighbour MONEY or " STUFF *to keep*, and it was *stolen* out of " his house, and the thief could not be " found, the master of the house was to " be brought before the judge, and to be " discharged, if he could swear, that he " had not *put his hand* unto his neigh- " bour's goods [*f*]," or, as the *Roman* author of the *LEX DEI* translates it, *Nihil se nequiter gessisse* [*g*]: but a distinction seems to have been made between a stealing

[*e*] 29 Ass. 28. Bro. Abr, *tit.* Bailment, pl. 7.

[*f*] Exod. xxii. 7, 8.

[*g*] Lib. 10. De Deposito. This book is printed in the same volume with the *Theodosian* Code, Paris, 1586.

by

by *day* and a stealing by *night* [*b*]; and "if CATTLE were bailed and stolen, (by "*day*, I presume,) the person who had "the care of them was bound to make "restitution to the owner [*i*];" for which the reason seems to be, that, when *cattle* are delivered *to be kept*, the bailee is rather a *mandatary* than a depositary, and is, consequently, obliged to use a degree of diligence *adequate to the charge;* now sheep can hardly be stolen in the *day-time* without some neglect of the shepherd; and we find that, when JACOB, who was, for a long time at least, a bailee of a different [41] sort, *as he had a reward*, lost any of the beasts intrusted to his care, LABAN made him answer for them "whether stolen by "day or stolen by night [*k*]."

[*b*] Gen. xxxi. 39.
[*i*] Exod. xxii. 12.
[*k*] Gen. xxxi. 39.

Notwith-

Notwithstanding the high antiquity, as well as the manifest good sense, of the rule, a contrary doctrine was advanced by Sir EDWARD COKE in his *Reports*, and afterwards deliberately inserted in his *Commentary* on LITTLETON, the great result of all his experience and learning; namely, "that a depositary is responsible, "if the goods be stolen from him, unless "he accept them specially *to keep as his* "*own*," whence he advises all depositaries to make such a special acceptance [*l*]. This opinion, so repugnant to natural reason and the laws of all other nations, he grounded partly on some broken cases in the Year-books, mere conversations on the bench, or loose arguments at the bar; and partly on SOUTHCOTE'S case, which he has reported, and which by no means warrants his deduction from it. As I humbly conceive that case to be law, though the

[*l*] 4 Rep. 83. b. 1. Inst. 89. a. b.

doctrine

doctrine of the learned reporter cannot in all points be maintained (19), I shall offer a few remarks on the pleadings in the cause, and the judgment given on them.

Southcote's case.

SOUTHCOTE declared in detinue, that he had delivered goods to BENNET, *to be by him* SAFELY *kept:* the defendant confessed SUCH delivery, but pleaded in bar, that a certain person STOLE them out of his possession; the plaintiff replied, protesting that he had not been robbed, that the person named in the plea was a SERVANT of the defendant, and demanded judgment; which, on a general demurrer to the replication, he obtained. "The "reason of the judgment, says Lord *Coke*, "was, because the plaintiff had delivered "the goods to be SAFELY kept, and the [42]

(19) See 2 Ld. Ray. 911, and note (c), 912—914.

"defendant

" defendant had taken the charge of them " upon himself, by accepting them on " SUCH a delivery." Had the reporter stopped here, I do not see what possible objection could have been made; but his exuberant erudition boiled over, and produced the frothy conceit, which has occasioned so many reflections on the case itself; namely, " that *to* KEEP and *to keep* " SAFELY are one and the same thing;" a notion, which was denied to be law by the whole court in the time of Chief Justice *Holt* [*m*].

It is far from my intent to speak in derogation of the great commentator on *Littleton*; since it may truly be asserted of him, as *Quintilian* said of CICERO, that *an admiration of his works is a sure mark of some proficiency in the study of the*

[*m*] Ld. Raym. 911. *margin.*

law;

law (20); but it must be allowed, that his profuse learning often ran wild, and that he has injured many a good case by the vanity of thinking to improve them.

The pleader, who drew the replication [43] in *Southcote*'s case, must have entertained

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(20) "Ille se profecisse sciat, cui Cicero valde "placebit." Instit. Orat. lib. 10. c. 1. § 6. Among the orators and statesmen of the ancient world, none has established a fairer claim to the applause and gratitude of posterity than Cicero: his orations are models of all that is to be admired and studied in eloquence—his other valuable productions have transmitted the best precepts of the rhetorical science, and the moral wisdom of a mind that, amidst the most important public avocations, carefully and profoundly noted every circumstance illustrative of the duties of men. This example should not be forgotten by those who are most busily engaged in the pursuits of honourable ambition: knowledge acquired by intercourse with mankind is of the highest practical value, and when communicated under the sanction of respectable talents and character, will not be imparted in vain. Thus might many great men secure a celebrity independent of the caprice of contemporary applause, and close the scene of life with the conscious exclamation of the poet, "Exegi monumentum ære perennius."

an idea, that the *blame* was *greater*, if a *servant* of the depositary stole the goods, than if a mere *stranger* had purloined them; since the defendant ought to have been more on his guard against a person, who had so many opportunities of stealing; and it was his own fault, if he gave those opportunities to a man, of whose honesty he was not morally certain: the court, we find, rejected this distinction, and also held the replication informal, but agreed, that no advantage could be taken on a *general* demurrer of such informality, and gave judgment on the substantial badness of the plea [*n*]. If the plaintiff, instead of replying, had demurred to the plea in bar, he might have insisted in argument, with reason and law on his side, "that, although "a *general* bailee *to keep* be responsible for "GROSS neglect *only*, yet *Bennet* had, by "a *special* acceptance, made himself an-

[*n*] 1 Cro. 815.

"swerable

" swerable for ORDINARY neglect *at least ;*
" that it was *ordinary* neglect to let the
" goods be *stolen* out of his possession, and
" he had not averred that they were stolen
" *without his default ;* that he ought to
" have put them into a *safe* place, accord-
" ing to his undertaking, and have kept
" the key of it himself; that the *special*
" bailee was reduced to the class of a
" *conductor operis*, or a workman *for hire ;*
" and that a tailor, to whom his employer
" has delivered lace for a suit of clothes, [44]
" is bound, if the lace be *stolen*, to restore
" the value of it [*o*]." This reasoning

[*o*] " Alia est *furti* ratio ; id enim *non casui*, sed *levi* " *culpæ*, fermè ascribitur." *Gothofr.* Comm. in L. *Contractus*, p. 145 See D. 17. 2. 52. 3. where, says the annotator, " Adversùs *latrones* parùm prodest custodia ; " adversùs *furem* prodesse potest, si quis advigilet." See also POTH. *Contrat de Louage*, n 429. and *Contrat de Pret à usage*, n. 53 So, by Justice *Cottesmore*, " Si jeo grante " byens a un home a garder a mon oeps, si les byens per " *son mesgarde* sont *embles*, il sera charge a moy de mesmes " les byens, mez s'il soit *robbe* de mesmes les byens, il est " excusable per le ley." 10 Hen. VI. 21.

would not have been just, if the bailee had pleaded, as in *Bonion*'s case, that he had been *robbed by violence*, for no degree of *care* can, in general, prevent an open robbery: *impetûs prædonum*, says ULPIAN, *à nullo præstantur*.

Mr. Justice POWELL, speaking of *Southcote*'s case, which he denies to be law, admits, that, "if a man *does* undertake "*specially* to keep goods SAFELY, that is "a warranty, and will oblige the bailee "to keep them safely against perils, where "*he has a remedy over*, but *not* against "those where he has *no* remedy over [*p*]." One is unwilling to suppose, that this learned judge had not read Lord *Coke*'s report with attention; yet the case, which he puts, is precisely that which he opposes, for Bennet *did* undertake "to keep the goods "SAFELY;" and, with submission, *the*

[*p*] Ld. Raym. 912.

degree

degree of care demanded, not *the remedy over*, is the true measure of the obligation; for the bailee might have his *appeal of robbery*, yet he is not bound to keep the goods against *robbers* without a most express agreement [*q*]. This, I apprehend, is all that was meaned by St. GERMAN, when he says, "that, if a man *have nothing* for "keeping the goods bailed, and promise, "at the time of the delivery, to restore "them *safe at his peril*, he is not respon- "sible for *mere casualties* [*r*];" but the rule extracted from this passage, "that *a* "*special* acceptance *to keep* SAFELY will "not charge the bailee against the acts "of *wrong-doers* [*s*]," to which purport HOBART also and CROKE are cited, is too general, and must be confined to acts of *violence*.

[*q*] 2 Sho. pl. 166.
[*r*] Doct. and Stud. dial. 2. chap. 38.
[*s*] Com. 135. Ld. Raym. 915.

I can-

I cannot leave this point without remarking, that a *tenant at will*, whose interest, when he has it rent-free, the *Romans* called PRECARIUM, stands in a situation exactly parallel to that of a depositary; for, although the contract be for *his benefit*, and, in some instances, for his benefit *only*, yet he has an *interest* in the land till the will is determined, "and, our "law adds it is the folly of the lessor, if "he do not restrain him by a special "condition:" thence it was adjudged, in the *Countess of Shrewsbury*'s case, "that
[46] "an action will not lie against a tenant "at will *generally*, if the house be burned "through his neglect [*t*];" but, says Justice *Powel*, "had the action been founded "on a *special* undertaking, as that, in consideration that the lessor would let him "live in the house, he would deliver it "up *in as good repair as it then was in*,

[*t*] 5 Rep. 13. b.

"such

"such an action would have been main-
"tainable [*u*]."

Rules and exceptions.

It being then established, that a bailee of the *first* sort is answerable only for a *fraud*, or for *gross* neglect, which is considered as evidence of it, and not for such *ordinary* inattentions as may be compatible with *good faith*, if the depositary be himself *a careless and inattentive* man; a question may arise, whether, if proof be given, that he is, in truth, very *thoughtful and vigilant in his own concerns*, he is not bound to restitution, if the deposit be lost through his neglect, either *ordinary* or *slight;* and it seems easy to support the affirmative; since in this case the measure of diligence is *that which the bailee uses in his own affairs.* It must, however, be confessed, that the character of the individual depositary can hardly be an object

[*u*] Ld. Raym. 911.

of

of judicial discussion: if he be *slightly* or even *ordinarily* negligent in keeping the goods deposited, the favourable presumption is, that he is equally neglectful of his own property; but this presumption, like all others, may be repelled; and, if
[47] it be proved, for instance, that, his house being on fire, he saved his own goods, and having time and power to save also those deposited, suffered them to be burned, he shall restore the worth of them to the owner [*w*]. If indeed, he have time to save only one of two chests, and one be a deposit, the other his own property, he may justly prefer his own; unless that contain things of small comparative value, and the other be full of much more precious goods, as fine linen or silks; in which case he ought to save the more valuable chest, and has a right to claim in-

[*w*] Pothier. *Contrat de Dépôt*, n. 29. Stiernh. *de Jure Sueon.* l. 2. c. 5.

demni-

demnification from the depositor for the loss of his own. Still farther; if he commit even a *gross* neglect in regard to his own goods *as well as* those bailed, by which *both* are lost or damaged, *he cannot be said to have violated good faith*, and the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person [*x*].

To this principle, that a depositary is answerable *only* for *gross* negligence, there are some exceptions.

First, as in *Southcote*'s case, where the bailee, by a *special* agreement, has engaged to answer for less: "Si quid nominatim "convenit," says the *Roman* lawyer, "vel "plus vel minus in singulis contractibus, [48] "hoc servabitur quod initio convenit; le-

[*x*] Bract. 99. b. Justin. Inst. l. 3. tit. 15.

"gem enim contractui dedit [*y*];" but the opinion of CELSUS, that an agreement *to dispense with deceit* is void, as being contrary to good morals and decency, has the assent both of *Ulpian* and our *English* courts [*z*].

Secondly; when a man spontaneously and officiously proposes to keep the goods of another, *he may prevent the owner from intrusting them with a person of more approved vigilance;* for which reason *he takes upon himself*, according to JULIAN, *the risk of the deposit, and becomes responsible at least for ordinary neglect, but not for mere casualties* [*a*].

Where things are deposited through necessity on any sudden emergence, as a

[*y*] l. *Contractus*, 23. D. *de reg. jur.*
[*z*] Doct. and Stud. dial. 2. chap. 38.
[*a*] D. 16. 3. 1. 35.

fire

fire or a shipwreck, M. LE BRUN insists, "that the depositary must answer for *less* "*than gross* neglect, how careless soever "he may be in his own affairs; since "the preceding remark, that *a man, who* "*reposes confidence in an improvident person,* "*must impute any loss to his own folly,* "is inapplicable to a case where the de- "posit was not optional; and *the law* "*ceases with the reason of it* [*b*];" but that is not the *only* reason; and, though it is an additional misfortune, for a man in extreme haste and deep distress to light upon a stupid or inattentive depositary, [49] yet I can hardly persuade myself, that more than perfect *good faith* is demanded in this case, although a violation of that faith be certainly more criminal than in other cases, and was therefore punished at *Rome* by a forfeiture of the double value of the goods deposited.

[*b*] *De la Prestation des Fautes*, p. 77.

In these circumstances, however, a benevolent *offer* of keeping another's property for a time would not, I think, bring the case within *Julian*'s rule before-mentioned, so as to make the person offering answerable for *slight*, or even *ordinary*, negligence; and my opinion is confirmed by the authority of LABEO, who requires no more than *good faith* of a *negotiorum gestor*, when "affectione coactus, ne bona "mea distrahantur, negotiis se meis ob-"tulerit."

Thirdly; when the bailee, improperly called a *depositary*, either *directly* demands and receives a reward *for his care*, or takes the charge of goods *in consequence of* some *lucrative* contract, he becomes answerable for *ordinary* neglect; since, in truth, he is in both cases a *conductor operis*, and *lets out* his mental labour at a just price: thus, when clothes are left with a man, who

who is paid for the use of his bath, or a trunk with an inn-keeper or his servants, or with a ferryman, the bailees are as much bound to indemnify the owners, if the goods be lost or damaged through their want of *ordinary* circumspection, as if they were to receive a stipulated recompence *for their attention and pains*; but [50] of this more fully, when we come to the article of *hiring*.

Fourthly; when the *bailee alone* receives advantage from the deposit, as, if a thing be borrowed on a future event, and deposited with the intended borrower, until the event happens, because the owner, perhaps, is likely to be absent at the time, such a depositary must answer even for *slight* negligence; and this bailment, indeed, is rather a *loan* than a deposit, in whatever light it may be considered by the

the parties. suppose, for example, that *Charles*, intending to appear at a masked ball expected to be given on a future night, requests *George* to lend him a dress and jewels for that purpose, and that *George*, being obliged to go immediately into the country, desires *Charles* to keep the dress till his return, and, if the ball be given in the mean time, to wear it; this seems to be a regular *loan*, although the original purpose of borrowing be future and contingent.

Since, therefore, the two last cases are not, in strict propriety, *deposits*, the exceptions to the general rule are reduced to two only: and the second of them, I conceive, will not be rejected by the *English* lawyer, although I recollect no decision or dictum exactly conformable to the opinion of *Julian*.

Clearly

Clearly as the obligation to *restore* a deposit flows from the nature and definition of this contract, yet, in the reign of ELIZABETH, when it had been adjudged, [51] consistently with common sense and common honesty, "that an action on the case "lay against a man, who had not per- "formed his promise of redelivering, or "delivering over, things bailed to him," that judgment was *reversed*; and, in the sixth year of JAMES, judgment for the plaintiff was arrested in a case exactly similar [*c*]: it is no wonder that the profession *grumbled*, as Lord HOLT says, at so absurd a reversal; which was itself most justly reversed a few years after, and the first decision solemnly established [*d*].

Among the curious remains of *Attic* law, which philologers have collected, very little

Grecian and Arabian laws.

[*c*] Yelv. 4: 50. 128.

[*d*] 2 Cro. 667. *Wheatley* and *Low*.

tle relates to the contracts which are the subject of this Essay; but I remember to have read of DEMOSTHENES, that he was advocate for a person, with whom *three* men had deposited some valuable utensil, of which they were joint-owners; and the depositary had delivered it to *one* of them, of whose knavery he had no suspicion; upon which the other *two* brought an action, but were nonsuited on their own evidence, that there was a *third* bailor, whom they had not joined in the suit; for, the truth not being proved, *Demosthenes* insisted, *that his client could not legally re-*
[52] *store the deposit, unless all three proprietors were ready to receive it;* and this doctrine was good at *Rome* as well as at *Athens*, when the thing deposited was in its nature incapable of partition: it is also law, I apprehend, in Westminster-hall [*e*].

[*e*] D. 16. 3. 1. 36. Bro. Abr. *tit.* Bailment, pl. 4.

The

The obligation to return a deposit faithfully was in very early times, holden sacred by the *Greeks*, as we learn from the story of GLAUCUS (21), who, on consult-

(21) He consulted the Delphian oracle to know if, by a false oath, he could safely withhold a deposit, that had been intrusted to his care, from the true owner; and received the following answer:

'Γλαῦκε Ἐπικυδείδη, τὸ μὲν αὐτίκα κερδίον ἔτω,
'Ορκῳ νίκησαι, καὶ χρήματα λήσασθαι·
'Ομνυ· ἔστι θανατόν γε καὶ εὐόρκου μένει ἀνδρα.
'Αλλ' ὅρκου παῖς ἐστιν ἀνώνυμος, οὐδ' ἐπι χεῖρες,
'Οὐδὲ πόδες· κραιπνὸς δὲ μετέρχεται, εἰσόκε πᾶσαν
'Συμμάρψας ὀλέσῃ γενεὴν, καὶ οἶκον ἅπαντα·
'Ἀνδρὸς δ' εὐόρκου γενεὴ μετοπίσθεν ἀμείνων.'

Terrified by this denunciation, Glaucus implored the forgiveness of the oracle, for harbouring his design of perjury and fraud, but was answered that to *meditate* and *commit* the crime were equal degrees of turpitude. The moral of the response is just and *perspicuous*: in deciding private questions the ancient oracles were, probably, seldom influenced by fear or corruption; on political occasions, the ingenuity of the managers of the vehicle was exercised in framing answers equivocally adapted both to flatter the views of ambition, and to preserve the credit of prophetic infallibility.

consulting the oracle, received this answer, "that it was criminal even *to harbour a* "*thought*

The frequency of introducing tales and fables in popular harangues among the ancients, is well known to the classical reader. Leutychides of Sparta, who told the story in question to the Athenians, to induce them to restore some hostages, who were said to be unjustly detained, added, that Glaucus, though he gave up the deposit, was punished by the vengeance of the Gods. The story, however, failed of its intended effect, the application of the Spartan ambassador being unsuccessful. The Athenians certainly did not want superstition, but they had, probably, wit enough to see that the story was not *a case in point.*

The satire in which Juvenal introduces his allusion to the story, is replete with the most dignified and impressive morality. After describing the manners of an earlier and more virtuous period, he exhibits the contrast of relaxed integrity in a modern and degenerate age:—

"Nunc si depositum non inficietur amicus
"Si reddat veteram cum totâ ærugine follem
"Prodigiosa fides."——

The punishment of guilt by the stings of conscience is finely described;

"Pœna autem vehemens, ac multo sævior illis.
"Quas et Cœditius gravis invenit aut Rhadamanthus,
"Nocte dieque suum gestara in pectore testem."

This

"*thought* of with-holding deposited goods "from the owners, who claimed them [*f*];" and a fine application of this *universal* law is made by an *Arabian* poet contemporary with JUSTINIAN, who remarks, "that "life and wealth are only *deposited* with "us by our Creator, and, *like all other* "*deposits*, must in due time be restored."

Law of mandates.

II. Employment by COMMISSION was also known to our ancient lawyers, and BRACTON, the best writer of them all, expresses it by the *Roman* word, *Mandatum;* now, as the very essence of this contract is the *gratuitous* performance of

[*f*] Herod. VI. 86. Juv. *Sat.* XIII. 199.

This valuable poet is, almost, the only satirist who appears to have lashed vice for the sake of virtue, and whose language preserves the consistent gravity of sincere reproof.

it by the bailee, and as the term *commission* is also pretty generally applied to bailees, who receive *hire* or *compensation* for their attention and trouble, I shall not scruple to adopt the word MANDATE as appropriated *in a limited sense* to the species of
[53] bailment now before us; nor will any confusion arise from the common acceptation of the word in the sense of a judicial command or precept, which is, in truth, only a *secondary* and inaccurate usage of it. The great distinction then between one sort of *mandate* and a *deposit* is, that the former *lies in fesance*, and the latter, simply *in custody:* whence, as we have already intimated, a difference often arises between the degrees of care demanded in the one contract and in the other; for, the mandatary being considered as having engaged himself to use *a degree of diligence and attention adequate to the performance*

of

of his undertaking, the omission of such diligence may be, according to the nature of the business, either *ordinary*, or *slight*, neglect; although a bailee of this species ought regularly to be answerable only for a violation of *good faith*. This is the common doctrine taken from the law of ULPIAN; but there seems, in reality, to be no exception in the present case from the general rule; for, since *good faith* itself obliges every man *to perform his actual engagements*, it of course obliges the mandatary to exert himself in proportion to the exigence of the affair in hand, and neither to *do* any thing, how minute soever, by which his employer may sustain damage, nor *omit* any thing, however inconsiderable, which the nature of the act requires [*g*]: nor will a want of ability to

[*g*] Lord Raym. 910. (22)

(22) See the case of Shiells v. Blackburne, 1 H. Black. Rep. 158, where this rule is importantly qualified

to perform the contract be any defence for the contracting party; for, though the law *exacts no impossible things*, yet it may justly require that every man shall know his own strength before he undertakes to do an act, and that, if he delude another by false pretentions to skill, he shall be responsible for any injury that may be occasioned by such delusion. If, indeed, an unskilful man yield to the pressing instances of his friend, who could not otherwise have his work performed, and engage reluctantly in the business, no higher degree of diligence can be demanded of him than a fair exertion of his capacity.

It is almost needless to add, that a mandatary, as well as a depositary, may bind

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qualified by the decision, that a mandatary, not receiving any reward for his trouble, nor being by profession impliedly skilful in the business undertaken, shall not be liable to an action if he perform his commission *bonâ fide* and to the best of his knowledge,

himself

himself by a *special* agreement to be answerable even for casualties; but that neither the one nor the other can exempt himself by any stipulation from responsibility for *fraud*, or its equivalent, *gross* neglect.

Distinction between *non*fesance and *mis*fesance.

A distinction seems very early to have been made in our law between the *non*fesance, and the *mis*fesance (23), of a *conductor operis*, and, by equal reason, of a mandatary; or, in other words, between a total failure of performing an executory undertaking and a culpable neglect in executing it; for, when an action on the case was brought against a carpenter, who, having undertaken to build a new house for the plaintiff within a certain time, *had not built it*, the court gave judgment [55]

(23) See the case of Elsee v. Gatward, 5 Term Rep. 143. where the principles upon which this distinction is founded are fully investigated.

of

of nonsuit; but agreed, that, if the defendant had built the house negligently and spoiled the timber, an action against him would have been maintainable [*b*]. However, in a subsequent reign, when a similar action was commenced against one WATKINS for *not building* a mill according to his undertaking, there was a long conversation between the judges and the bar, which Chief Justice *Babington* at length interrupted by ordering the defendant's counsel either to plead or to demur; but Serjeant *Rolf* chose to plead specially, and issue was taken on a *discharge* of the agreement [*i*]. Justice *Martin* objected to the action, because no tort was alledged; and he persisted warmly in his opinion, which seems not wholly irreconcilable to that of

[*b*] Yearb. 11 Hen. IV. 33. (24)

[*i*] Yearb. 3 Hen. VI. 36. b. 37. a. *Stath.* Abr. tit. *Accions sur le cas.* pl. 20.

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(24) 5 Term Rep. 150.

his

his two brethren; for in the cases, which they put, a special injury *was* supposed to be occasioned by the non-performance of the contract.

Authority and reason both convince me, that *Martin*, into whose opinion the reporter recommends an inquiry, was wrong in his objection, if he meaned, as Justice *Cokain* and the Chief Justice seem to have understood him, that no such action would lie for *non*fesance, even *though special damage had been stated.* His argument was, that the action before them *sounded in convenant* merely, and required a specialty to support [56] it; but that, if the covenant had been changed into a *tort*, a good writ of trespass on the case might have been maintained: he gave, indeed, an example of *mis*fesance, but did not controvert the instances, which were given by the other judges.

It was not alledged in either of the cases just cited, that the defendant was to receive *pay* for the fesance of his work; but since both defendants were described as *actually in trade*, it was not, perhaps, intended, that they were to work *for nothing*: I cannot, however, persuade myself, that there would have been any difference, had the promises been purely *gratuitous*, and had a special injury been caused by the breach of them. Suppose, for instance, that *Robert*'s corn-fields are surrounded by a ditch or trench, in which the water from a certain spring used to have a free course, but which has of late been obstructed by soil and rubbish; and that *Robert* informing his neighbour *Henry* of his intention speedily to clear the ditch, *Henry* offers and undertakes immediately to remove the obstruction and repair the banks *without reward*, he having business of the same kind to perform on his own gronnds:

grounds: if, in this case, *Henry* neglect to do the work undertaken, "and the "water, not having its natural course, "overflow the fields of *Robert* and spoil "his corn," may not *Robert* maintain his action on the case? Most assuredly; and so in a thousand instances of proper bailments that might be supposed, where a [57] just reliance on the promise of the defendant prevented the plaintiff from employing another person, and was consequently the cause of the loss which he sustained [*k*]; for it is, as it ought to be, a general rule, that, for every *damnum injuriâ datum*, an action of some sort, which it is the province of the pleader to advise, may be maintained; and although the *gratuitous* performance of an act be a *benefit* conferred, yet, according to the just maxim of PAULUS, *Adjuvari nos, non decipi, beneficio oportet* [*l*], but

[*k*] Yearb. 19 Hen. VI. 49 [*l*] D. 13. 6. 17. 3.

the *special* damage, not the assumption, is the cause of *this* action; and, if *notice* be given by the mandatary, *before any damage incurred, and while another person may be employed*, that he cannot perform the work, no process of law can enforce the performance of it.

A case in *Brook*, made complete from the Year-book, to which he refers, *seems* directly in point; for, by Chief Justice FINEUX, *it had been adjudged*, that, "if "a man assume to build a house for me "by a certain day, and do not build it, "*and I suffer damage by his nonfesance*, "I shall have an action on the case, as "well as if he had *done it amiss:*" but it is *possible*, that *Fineux* might suppose a consideration, though none be mentioned [*m*],

[*m*] Bro. Abr. *tit.* Action sur le Case, 72. (25)

(25) 5 Term Rep. 143.

Actions

Actions on this contract are, indeed, very uncommon, for a reason not extremely flattering to human nature; because it is very uncommon to undertake any office of trouble *without compensation:* but, whether the case really happened, or the reward, which had actually been stipulated, was omitted in the declaration, the question "whether a man was re-"sponsible for damage to certain goods "occasioned by his negligence in perform-"ing a GRATUITOUS promise," came before the court, in which Lord *Holt* presided, so lately as the second year of Queen ANNE; and a point, which the first elements of the *Roman* law have so fully decided, that no court of judicature on the Continent would suffer it to be debated, was thought in ENGLAND *to deserve*, what it certainly received, *very great consideration* [*n*].

[*n*] Ld. Raym. 909—920. 1 Salk. 26. Com. 133. Farr. 13. 131. 528.

The

Case of Coggs and Bernard.

The case was this: BERNARD had assumed *without pay* safely to remove several casks of brandy from one cellar, and lay them down *safely* in another, but managed them so negligently, that one of the casks was staved. After the general issue joined, and a verdict for the plaintiff COGGS, a motion was made in arrest of judgment on the irrelevancy of the declaration, in which it was neither alledged, that the defendant was to have *any recompence for his pains*, nor that he was a *common porter:* but the court were unanimously of opinion, that the action lay; and, as it was thought a matter of great consequence, each of the judges delivered his opinion separately.

[59]

The Chief Justice, as it has before been intimated [*o*], pronounced a clear, methodical, elaborate argument; in which he distinguished bailments into *six* sorts,

[*o*] P. 35.

and

and gave a history of the principal authorities concerning each of them. This argument is justly represented by my learned friend, the annotator *on the First Institute*, as "a most masterly view of "the whole subject of bailment [*p*];" and, if my little work be considered merely as a commentary on it, the student may,

[*p*] Hargr. Co. Litt. 89. b. n. 3. The profession must lament the necessary suspension of this valuable work (26).

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(26) Perhaps it may be thought superfluous to intimate that the cause of this regret no longer exists, the publication alluded to having been since compleated by Mr. Butler. The editorial labours of the learned gentleman who enjoyed the friendship of our author, extended to very nearly half the work, (see Mr. Hargrave's Address to the Public, 1st Instit. 13th edition,) and it has, upon the whole, been executed so much to the satisfaction of the profession, that a comparison of the merits of the two respectable editors would be invidious, "et vitula tu dignus, et hic:" if the extensive legal learning and profound reasoning (sometimes a little *recherché*) of Mr. Hargrave excite the admiration of the studious lawyer, he cannot but respect the manly sense and useful industry of Mr. Butler.

perhaps,

perhaps, think, that my time and attention have not been unusefully bestowed.

For the decision of the principal case, it would have been sufficient, I imagine, to insist that the point was *not new*, but had already been determined; that the writ in the REGISTER, called, in the strange dialect of our forefathers, *De pipâ vini cariandâ* [*q*], was not similar, but identical; for, had the reward been the *essence* of the action, it must have been inserted in the writ, and nothing would have been left for the declaration but the
[60] stating of the day, the year, and other circumstances; of which *Rastell* exhibits a complete example in a writ and declaration for *negligently and improvidently planting a quickset hedge*, which the defendant had promised to raise, *without any consi-*

[*q*] Reg. Orig. 110. a. see also 110. b. *De equo infirmo sanando*, and *De columbari reparando*.

deration

deration alledged; and issue was joined on a traverse of the negligence and improvidence [*r*]. How any answer could have been given to these authorities, I am at a loss even to conceive: but, although it is needless to prove the same thing twice, yet other authorities, equally unanswerable, were adduced by the court, and supported with reasons no less cogent; for *nothing*, said Mr. Justice *Powell* emphatically, *is law, that is not reason* (27); a maxim in theory excellent, but in practice dangerous, as many rules, true in the abstract, are false in the concrete; for, since the reason of *Titius* may, and frequently does, differ from the reason of *Septimius*, no man, who is not a lawyer, would ever know how to act, and no man, who is a lawyer, would in many

[*r*] Rast. Entr. 13. b.

(27) 2 Ld. Raym. 911.

instances

instances know what to advise, unless courts were bound by *authority*, as firmly as the pagan deities were supposed to be bound by the decrees of fate.

Now the *reason* assigned by the learned judge for the cases in the *Register* and *Year-books*, which were the same with *Coggs* and *Bernard*, namely, "that the "party's SPECIAL *assumpsit* and under- "taking obliged him *so* to do the thing, "that the bailor came to no damage by [61] "his neglect," seems to intimate, that the omission of the words *salvò et securè* would have made a difference in this case, as in that of a *deposit*; but I humbly contend, that those words are implied by the nature of a contract which lies in *fesance*, agreeably to the distinction with which I began this article. As judgment, indeed, was to be given on the record merely, it was unnecessary, and might have

have been improper, to have extended the proposition beyond the point then before the court; But I cannot think that the narrowness of the proposition in this instance affects the general doctrine, which I have presumed to lay down; and, in the strong case of the shepherd, *who had a flock to keep*, which he *suffered through negligence to be drowned*, neither a *reward* nor a *special* undertaking are stated [*s*]: that case, in the opinion of Justice *Townsend*, depended upon the distinction between a bargain *executed* and *executory*; but I cannot doubt the relevancy of an action in the second case, as well as the first, *whenever actual damage is occasioned by the nonfesance* [*t*] (28).

There

[*s*] Yearb. 2 Hen. VII. 11.

[*t*] *Stath. Abr. tit Accions sur le cas.* pl. 11. By Justice *Paston*, "si un ferrour face covenant ove moy de fer-
"rer

(28) See "Paley's Principles of Moral and Political Philosophy," b. 3. ch. 12. where the subject

There seems little necessity after this, to mention the case of *Powtnary* and *Walton*,
[62] the *reason* of which applies directly to the present subject; and, though it may be objected that the defendant was stated as a *farrier*, and must be *presumed* to have acted *in his trade*, yet Chief Justice *Rolle* intimates no such presumption; but says expressly, that "an action on the case "lies upon this matter, *without alledging* "*any consideration;* for the *negligence* is "the cause of action, and not the *assumpsit* [*u*]."

"rer mon chival, jeo die qe sil *ne ferra* mon chival, un-
"core jeo averai accion sur mon cas, qar en son default
"peraventure mon chival est perie."
[*u*] 1 Ro. Abr. 10.

"of commissions" is concisely, but very intelligently treated. The public are much indebted to this writer for the elucidation of moral and political topics in a manner that "comes home to men's business and "bosoms."

A bail-

A bailment without reward to *carry* from place to place is very different from a mandate to *perform a work*; and, there being nothing to take it out of the general rule, I cannot conceive that the bailee is responsible for *less* than *gross* neglect, unless there be a *special* acceptance: for instance, if *Stephen* desire *Philip* to carry a diamond-ring from *Bristol* to a person in *London*, and he put it *with bank-notes of his own* into a letter-case, out of which it is *stolen* at an inn, or seized by a robber on the road, *Philip* shall not be answerable for it; although a *very careful*, or, perhaps, a *commonly prudent*, man would have kept it in his purse at the inn, and have concealed it somewhere in the carriage; but, if he were to secrete *his own notes* with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chaise, I think he would be bound,

in

in case of a loss by stealth or robbery, to restore the value of it to *Stephen*: every
[63] thing, therefore, that has been expounded in the preceding article concerning *deposits*, may be applied exactly to *this sort* of bailment, which may be considered as a subdivision of the second species.

Since we have nothing in these cases analogous to the judgments of *infamy*, which were often pronounced at *Rome* and *Athens*, it is hardly necessary to add, what appears from the speech of CICERO for *S. Roscius* of *Ameria*, that "the an-"cient *Romans* considered a mandatary as "*infamous*, if he broke his engagement, "not only by actual *fraud*, but even by "*more than ordinary negligence* [*w*]."

[*w*] "In privatis rebus, si quis rem *mandatam* non "modo *malitiosiùs* gessisset, sui quæstûs aut commodi causâ, "verùm etiam *negligentiùs*, eum majores summum admi-"sisse dedecus existimabant: itaque *mandati* constitutum "est judicium, non minùs turpe quàm *furti*." Pro S. Rosc. p. 116. *Glasg.*

As

As to *exceptions* from the rule concerning the degree of neglect, for which a mandatary is responsible, almost all that has been advanced before in the article of *deposits*, in regard to a special convention, a voluntary offer, and an interest accruing to both parties, or only to the bailee, may be applied to mandates: an undertaker of a work for the benefit of an absent person, and *without his knowledge*, is the *negotiorum gester* of the civilians, and the obligation resulting from his implied contract has been incidentally mentioned in a preceding page.

Exceptions to the rule.

III. On the third species of bailment, which is one of the most usual and most convenient in civil society, little remains to be observed; because our own, and the Roman, law are on this head perfectly coincident. I call it, after the *French* lawyers, *loan for use*, to distinguish it from their

[64]

Law of loans for use.

their *loan for consumption*, or the MUTUUM of the *Romans*; by which is understood the lending of *money*, *wine*, *corn*, and other things, that may be valued by number, weight, or measure, and are to be restored only in equal value or quantity [*x*]: this latter contract, which, according to St. GERMAN, is most properly called a *loan*, does not belong to the present subject; but it may be right to remark, that, as the *specific* things are not to be returned, the *absolute* property of them is transferred to the borrower, who must bear the loss of them, if they be destroyed by wreck,

[*x*] Doct. and Stud. dial. 2. ch. 38. Bract. 99. a. b. In Ld. Raym. 916. where this passage from *Bracton* is cited by the Chief Justice, *mutuam* is printed for *commodatam*; but what then can be made of the words *ad* IPSAM *restituendam?* There is certainly some mistake in the passage, which must be very ancient, for the oldest MS that I have seen, is conformable to *Tottel*'s edition. I suspect the omission of a whole line after the word *precium*, where the manuscript has a full point; and possibly the sentence omitted may be thus supplied from *Justinian*, whom *Bracton* copied: "At is, qui *mutuum* accepit, obligatus rema-"net," si sorte incendio, &c. *Inst.* 3. 13. 2.

pillage,

pillage, fire, or other inevitable misfortune. Very different is the nature of the [65]
bailment in question; for a horse, a chariot, a book, a greyhound, or a fowling-piece, which are lent for the use of the bailee, ought to be redelivered *specifically;* and the owner must abide the loss, if they perish through any accident which a *very careful and vigilant man* could not have avoided. The negligence of the borrower, who alone receives benefit from the contract, is construed rigorously, and, although *slight*, makes him liable to indemnify the lender; nor will his incapacity to exert *more than ordinary* attention avail him on the ground of an *impossibility*, "which the laws, says the rule, never "demands;" for that maxim relates merely to things *absolutely* impossible; and it was not only very *possible*, but very *expedient*, for him to have examined his own capacity of performing the undertaking,

before he deluded his neighbour by engaging in it: if the lender, indeed, was not deceived, but perfectly knew the *quality*, as well as age, of the borrower, he must be supposed to have demanded no higher care than that of which *such* a person was capable; as, if *Paul* lend a fine horse to a raw youth, he cannot exact the same degree of management and circumspection, which he would expect from a riding-master, or an officer of dragoons [*y*].

From the rule, that a borrower is answerable for *slight* neglect, compared with
[66] the distinction before made between simple *theft* and *robbery* [*z*], it follows, that, if the borrowed goods be *stolen* out of his possession by any person whatever, he must pay the worth of them to the lender, unless he prove that they were purloined

[*y*] *Dumoulin*, tract *De eo quod interest*, n. 185.
[*z*] See p. 44. and note [*o*].

notwith-

notwithstanding his *extraordinary* care. The example given by *Julian*, is the first and best that occurs: *Caius* borrows a silver ewer of *Titius*, and afterwards delivers it, that it may be safely restored, to a bearer of such approved fidelity and wariness, that no event could be less expected than its being stolen; if, after all, the bearer be met in the way by scoundrels, who contrive to *steal* it, *Caius* appears to be wholly blameless, and *Titius* has suffered *damnum sine injuriâ*. It seems hardly necessary to add, that the same care, which the bailee is bound to take of the *principal* thing bailed, must be extended to such *accessory* things as belong to it, and were delivered with it: thus a man who borrows a watch, is responsible for *slight* neglect of the chain and seals.

Opinion of Puffendorf disputed.

Although the laws of *Rome*, with which those of *England* in this respect agree,

most expressly decide, that a borrower, using more than ordinary diligence, *shall not be chargeable, if there be a force which he cannot resist* [a], yet PUFFENDORF employs much idle reasoning, which I am not idle enough to transcribe, in support of a new opinion, namely, "that the bor-
[67] "rower ought to indemnify the lender, "if the goods lent be destroyed by fire, "shipwreck, or other inevitable accident, "and *without his fault*, unless *his own* "perish with them:" for example, if *Paul* lend *William* a horse worth thirty guineas to ride from *Oxford* to *London*, and *William* be attacked on a heath in that road by highwaymen, who kill or seize the horse, he is obliged, according to *Puffendorf* and his annotator, to pay thirty guineas to *Paul*. The justice and good sense of the contrary decision are evinced beyond a doubt by M. POTHIER,

[a] D. 44. 7. 1. 4. Ld. Raym. 916.

who

who makes a distinction between those cases, where the loan was the *occasion* merely of damage to the lender, who might in the mean time have sustained a loss from other accidents, and those, where the loan was the sole efficient *cause* of his damage [*b*]; as if *Paul*, having *lent* his horse, should be forced in the interval by some pressing business to *hire* another for himself; in this case the borrower ought, indeed, to pay for the hired horse, unless the lender had voluntarily submitted to bear the inconvenience *caused* by the loan; for, in this sense and in this instance, *a benefit conferred should not be injurious to the benefactor*. As to a condition *presumed* to be imposed by the lender, that he would not abide by any loss *occasioned* by the lending, it seems the wildest and most unreasonable of presump-

[*b*] Poth. *Prêt à Usage*, n. 55. *Puf.* with *Barbeyrac*'s notes, b. 5. c. 4. § 6.

tions :

tions: if *Paul* really intended to impose
[68] such a condition, he should have declared his mind; and I persuade myself, that *William* would have declined a favour so hardly obtained.

Cases and distinctions.

Had the borrower, indeed, been imprudent enough to leave the high road and pass through some thicket, where robbers might be supposed to lurk, or had he travelled in the dark at a very unseasonable hour, and had the horse, in either case, been taken from him or killed, he must have indemnified the owner; for *irresistible force* is no excuse, if a man put himself in the way of it by his own rashness. This is nearly the case, cited by *St. German* from the *Summa Rosella*, where a *loan* must be meaned, though the word *depositum* be erroneously used [*c*]; and it is there decided, that, if the bor-

[*c*] *Doct.* and *Stud.* where before cited.

rower

rower of a horse will imprudently ride by *a ruinous house in manifest danger of falling*, and part of it actually fall on the horse's head, and kill him, the lender is entitled to the price of him; but that, if the house were *in good condition* and *fell* by the violence of a sudden hurricane, the bailee shall be discharged. For the same, or a stronger, reason, if *William*, instead of coming to *London*, for which purpose the horse was lent, go towards *Bath*, or, having borrowed him for a week, keep him for a month, he becomes responsible for any *accident* that may befal the horse in his journey to *Bath*, or after the expiration of the week [*d*].

Thus, if *Charles*, in a case before put [*e*], [69] wear the masked habit and jewels of *George* at the ball, for which they were borrowed, and be *robbed* of them in his return home

[*d*] Ld. Raym. 915. [*e*] P. 50.

at

at the usual time and by the usual way, he cannot be compelled to pay *George* the value of them; but it would be otherwise, if he were to go with the jewels from the theatre to a gaming-house, and were there to lose them by any casualty whatever. So, in the instance proposed by *Gaius* in the Digest, if silver utensils be lent to a man for the purpose of entertaining a party of friends at supper *in the metropolis*, and he carry them *into the country*, there can be no doubt of his obligation to indemnify the lender, if the plate be lost by accident however irresistible.

There are other cases, in which a borrower is chargeable for *inevitable mischance*, even when he has not, as he legally may, taken the whole risk upon himself by express agreement. For example, if the house of *Gaius* be in flames, and he, being able to secure one thing only, save an

an urn of his own in preference to the silver ewer, which he had borrowed of *Titius*, he shall make the lender a compensation for the loss; especially if the ewer be the more valuable, and would consequently have been preferred, had he been owner of them both: even if his urn be the more precious, he must either leave it, and bring away the borrowed vessel, or pay *Titius* the value of that [70] which he has lost; unless the alarm was so sudden, and the fire so violent, that no deliberation or selection could be justly expected, and *Caius* had time only to snatch up the first utensil that presented itself.

Since openness and honesty are the soul of contracts, and since "a suppression of "truth is often as culpable as an express "falsehood," I accede to the opinion of M. *Pothier*, that, if a soldier were to borrow

row a horse of his friend for a battle expected to be fought the next morning, and were *to conceal from him that his own horse was as fit for the service*, and if the horse so borrowed were slain in the engagement, the lender ought to be indemnified; for probably the dissimulation of the borrower induced him to lend the horse; but, had the soldier openly and frankly acknowledged, *that he was unwilling to expose his own horse*, since, in case of a loss, he was unable to purchase another, and his friend, nevertheless, had generously lent him one, the lender would have run, as in other instances, the risk of the day.

If the bailee, to use the *Roman* expression, be IN MORA, that is, if *a legal demand* have been made by the bailor, he must answer for any casualty that happens *after the demand*; unless in cases where

where it may be strongly presumed, that the same accident would have befallen the thing bailed, even if it had been restored at the proper time; or, unless the bailee have legally tendered the thing, and the [71] bailor have put himself *in morâ* by refusing to accept it: this rule extends of course to every species of bailment.

Controversy among the civilians.

" Whether in the case of a *valued loan*, " or where the goods lent are *estimated at* " *a certain price*, the borrower must be " considered as bound *in all events* to re- " store either the things lent or the value " of them," is a question upon which the civilians are as much divided, as they are upon the celebrated clause in the law *Contractus:* five or six commentators of high reputation enter the lists against as many of equal fame, and each side displays great ingenuity and address in this juridical tournament. *D' Avezan* supports the

the affirmative, and *Pothier* the negative; but the second opinion seems the more reasonable. The word PERICULUM, used by *Ulpian*, is in itself equivocal; it means *hazard* in general, proceeding either from *accident* or from *neglect*; and in this latter sense it appears to have been taken by the *Roman* lawyer in the passage which gave birth to the dispute. But, whatever be the true interpretation of that passage, I cannot satisfy myself, that, either in the *Customary Provinces* of FRANCE, or in ENGLAND, a borrower can be chargeable for all events *without his consent unequivocally given:* if *William*, indeed, had said to *Paul* alternatively, "I promise, on my re-"turn to *Oxford*, *either* to restore your "horse *or* to pay you thirty guineas," he
[72] must *in all events* have performed one part of this disjunctive obligation [*f*]; but, if *Paul* had only said, "the horse, which I

[*f*] Palm. 551.

"lend

"lend you for this journey, is fairly "worth thirty guineas," no more could be implied from those words, than a design of preventing any future difficulty about the price, if the horse should be killed or injured through an omission of that *extraordinary* diligence which the nature of the contract required.

Exceptions to the rule.

Besides the *general* exception to the rule concerning the degrees of neglect, namely, *Si quid convenit vel plus vel minus*, another is, where goods are lent for a use, in which the lender has *a common interest* with the borrower: in this case, as in other bailments *reciprocally* advantageous, the bailee can be responsible for no more than *ordinary* negligence; as, if *Stephen* and *Philip* invite some common friends to an entertainment prepared at their joint expence, for which purpose *Philip* lends a service of plate to his compa-

companion, who undertakes the whole management of the feast, *Stephen* is obliged only to take *ordinary* care of the plate; but this, in truth, is rather the innominate contract *do ut facias*, than a proper *loan*.

Agreeably to this principle, it must be decided, that, if goods be lent for the *sole* advantage of the *lender*, the borrower is answerable for *gross* neglect only; as,
[73] if a passionate lover of music were to lend his own instrument to a player in a concert, merely to augment his pleasure from the performance; but here again, the bailment is not so much a *loan*, as a *mandate*; and, if the musician were to play with all due skill and exertion, but were to break or hurt the instrument without any malice or very culpable negligence, he would not be bound to indemnify the *amateur*, as he was not in want of

of the instrument, and had no particular desire to use it. If, indeed, a poor artist, having lost or spoiled his violin or flute, be much distressed by this loss; and a brother-musician obligingly, though *voluntarily*, offer to lend him his own, I cannot agree with DESPEISSES, a learned advocate of *Montpelier* and writer on *Roman* law, that the player may be less careful of it than any other borrower: on the contrary, he is bound, in conscience at least, to raise his attention even to a higher degree; and his negligence ought to be construed with rigour.

Mosaic and Attic laws.

By the law of MOSES, as it is commonly translated, a remarkable distinction was made between the loss of borrowed cattle or goods, happening in the *absence*, or the *presence*, of the OWNER; for, says the divine legislator, "if a man borrow "aught of his neighbour, and it be hurt "or

" or die, *the owner thereof not being with* " *it*, he shall surely make it good; but " if the *owner* thereof *be* with it, he shall " *not* make it good [*g*]:" now it is by
[74] no means *certain*, that the original word signifies the *owner*, for it *may* signify the *possessor*, and the law *may* import, that the borrower ought not to lose sight, when he can possibly avoid it, of the thing borrowed; but if it was intended that the borrower should always answer for casualties, *except in the case*, which must rarely happen, of *the owner's presence*, this exception seems to prove, that no casualties were meaned, but such as *extraordinary* care might have prevented; for I cannot see, what difference could be made by the presence of the owner, if the force, productive of the injury, were wholly irresistible, or the accident inevitable.

[*g*] Exod. xxii. 14, 15.

An

An old *Athenian* law is preserved by *Demosthenes*, from which little can be gathered on account of its generality and the use of an ambiguous word [*b*]: it is understood by *Petit* as relating to guardians, mandataries, and commissioners; and it is cited by the orator in the case of a guardianship. The *Athenians* were, probably, satisfied with speaking very generally in their laws, and left their juries, for juries they certainly had, to decide favourably or severely, according to the circumstances of each particular case.

[75] Law of pledges.

IV. As to the degree of diligence which the law requires from a *pawnee*, I find myself again obliged to dissent from Sir *Edward Coke*, with whose opinion a similar liberty has before been taken in regard

[*b*] Περὶ ὧν καθυφῇκέ τις, ὁμοίως ὀφλισκάνειν, ὥσπερ ἂν αὐτὸς ἔχῃ. *Reiske*'s edition, 855. 3. Here the verb καθυφιέναι may imply *slight*, or *ordinary*, neglect; or even *fraud*, as *Petit* has rendered it.

Doctrine of Lord Coke denied.

to a *depositary*; for that very learned man lays it down, that, "if goods be delivered "to one as a *gage* or *pledge*, and they "be *stolen*, he shall be discharged, because "*he hath a property* in them; and, *there-* "*fore*, he ought to keep them *no otherwise* "*than his own* [*i*]:" I deny the first proposition, the reason, and the conclusion.

Since the bailment, which is the subject of the present article, is beneficial to the *pawnee* by securing the payment of his debt, *and* to the *pawnor* by procuring him credit, the rule which natural reason prescribes, and which the wisdom of nations has confirmed, makes it requisite for the person to whom a gage or pledge is bailed, to take *ordinary* care of it; and he must consequently be responsible for *ordinary* neglect [*k*]. This is expressly holden by

[*i*] 1 Inst. 89. a. 4 Rep. 83. b.
[*k*] Bract. 99. b.

BRACTON;

BRACTON; and, when I rely on his authority, I am perfectly aware that he copied *Justinian* almost word for word, and that Lord *Holt*, who makes considerable use of his Treatise, observes three or four times, "that he was an *old* au-"thor [*l*];" but, although he had been a civilian, yet he was also a great common- [76]
lawyer, and never, I believe, adopted the rules and expressions of the *Romans*, except when they coincided with the laws of *England* in his time: he is certainly the *best* of our juridical classics; and, as to our *ancient* authors, if their doctrine be *not law*, it must be left to mere historians and antiquaries; but, if it remain unimpeached by any later decision, it is not only equally binding with the most recent law, but has the advantage of being matured and approved by the collected sagacity and experience of ages. The doctrine

[*l*] Ld. Raym. 915. 916. 919.

in question has the full assent of Lord *Holt* himself, who declares it to be "*sufficient*, if the pawnee use *true* and *ordinary* diligence for restoring the goods, "and that, so doing, he will be indemnified, and, notwithstanding the loss, shall "resort to the pawnor for his debt (29)." Now it has been proved, that "a bailee "cannot be considered as using *ordinary* "diligence, who suffers the goods bailed "to be taken by *stealth* out of his custody [*m*];" and it follows, that "a "pawnee shall *not* be discharged, if the "pawn be simply *stolen* from him;" but if he be forcibly *robbed* of it *without his fault*, his debt shall not be extinguished.

The passage in the *Roman* institutes, which *Bracton* has nearly transcribed, by

[*m*] P. 44. note [*o*].

(29) Ld. Raym. 917.

no

no means convinces M. Le Brun, that a *pawnee* and a *borrower* are not responsible for *one and the same* degree of [77] negligence; and it is very certain that *Ulpian* speaking of the *Actio pignoratitia*, uses these remarkable words: "Venit in "*hac* actione et *dolus* et *culpa* UT in "*commodato*, venit et custodia; vis major "non venit." To solve this difficulty *Noodt* has recourse to a conjectural emendation, and supposes UT to have been inadvertently written for AT; but if this was a mistake, it must have been pretty ancient, for the *Greek* translators of this sentence use a particle of similitude, not an adversative: there seems, however, no occasion for so hazardous a mode of criticism. *Ulpian* has not said, "*talis* culpa "*qualis* in commodato;" nor does the word UT imply an *exact* resemblance: he meaned, that a pawnee was answerable for *neglect*, and gave the first instance

Conjectural criticism of *Noodt*.

stance that occurred of another contract, in which the party was likewise answerable for *neglect*, but left the *sort* or *degree* of negligence to be determined by his *general* rule; conformably to which he himself expressly mentions PIGNUS among other contracts *reciprocally useful*, and distinguishes it from COMMODATUM, whence the borrower *solely* derives advantage [*n*].

Case in the Book of Assise.

It is rather less easy to answer the case in the Book of *Assise*, which seems wholly subversive of my reasoning, and, if it stand unexplained, will break the harmony of my system [*o*]; for there, in an action of detinue for a hamper, which had been bailed by the plaintiff to the defendant, the bailee pleaded, "that it "was delivered to him *in gage* for a "certain sum of money; that he had put "it among his other goods; and that all

[78]

[*n*] Before, p. 16. [*o*] 29 Ass. pl. 28.

"together

" together had been *stolen* from him :" now according to my doctrine, the plaintiff might have demurred to the plea ; but he was *driven* to reply, " that he *ten-* " *dered* the money before the *stealing*, and " that the creditor refused to accept it," on which fact issue was joined ; and the reason assigned by the Chief Justice was, that, " if a man bail goods to me *to keep*, " and I put them among my own, I shall " not be charged if they be *stolen*." To this case I answer : first, that, if the court really made no difference between a *pawnee* and a *depositary* they were indubitably mistaken ; for which assertion I have the authority of *Bracton*, Lord *Holt*, and *St. German*, who ranks the taker of a *pledge* in the same class with a *hirer* of goods [*p*] ; next, that in a much later case, in the reign of Hen. VI. where a *hiring of custody* seems to be meaned, the distinction

[*p*] Doct. and Stud. *dial.* 2. *ch.* 38.

between

between a *theft* and a *robbery* is taken agreeably to the *Roman* law [*q*]; and, lastly, that, although in the strict propriety of our *English* language, to *steal* is to take *clandestinely*, and to *rob* is to seize by *violence*, corresponding with the *Norman* verbs *embleer* and *robber*, yet those
[79] words are sometimes used inaccurately; and I always suspected, that the case in the Book of *Assise* related to a *robbery*, or a taking *with force;* a suspicion confirmed beyond any doubt by the judicious *Brook*, who abridges this very case with the following title in the margin, "Que serra "al perde, quant les biens sont *robbes* [*r*]:" and in a modern work, where the old cases are referred to, it appears to have been settled, in conformity to them and to reason, "that if the pawn be laid up, and the "pawnee be *robbed*, he shall not be an-

[*q*] Before, p. 44. note [*o*].

[*r*] Abr. *tit.* Bailment, pl. 7.

"swerable :"

"swerable [*s*]:" but Lord *Coke* seems to have used the word *stolen* in its proper sense, because he plainly compares a pawn with a deposit.

If, indeed, the thing pledged be taken *openly* and *violently* through the *fault* of the pledgee, he shall be responsible for it; and, after a *tender* and *refusal* of the money owed, which are equivalent to actual *payment*, *the whole property is instantly revested in the pledgor*, and he may consequently maintain an action of trover [*t*]: it is said in a most useful work, that by such tender and refusal the thing pawned "ceases to be a pledge and becomes a "*deposit* [*u*];" but this must be an error

[*s*] 2 Salk. 522.

[*t*] 29 Ass. pl. 28. Yelv. 179. *Ratcliff* and *Davis*.

[*u*] Law of *Nisi Prius*, 72. (30)

(30) In the subsequent editions of that work, the words "*and becomes a deposit*" are omitted.

of

of impression; for there can never be a *deposit* without the owner's consent, and a *depositary* would be chargeable only for
[80] *gross* negligence, whereas the pawnee, whose special property is determined by the wrongful detainer, becomes liable *in all possible events* to make good the thing lost, or to relinquish his debt [*w*].

Lord Coke's reasons contested.

The reason given by *Coke* for his doctrine, namely, "because the pawnee has "a *property* in the goods pledged," is applicable to every other sort of bailment, and proves nothing in regard to any *particular* species; for every bailee has a temporary *qualified* property in the things of which possession is delivered to him by the bailor, and has, therefore, a possessory action or an appeal in his own name against any stranger who may damage or

[*w*] Ld. Raym. 917.

purloin

purloin them [x]. By the *Roman* law, indeed, "even the possession of the depositary was holden to be that of the "person depositing;" but with us the general bailee has unquestionably a *limited* property in the goods intrusted to his care: he may not, however, *use* them on any account without the consent of the owner, either expressly given, if it can possibly be obtained, or at least strongly presumed; and this presumption varies, as the thing is likely to be better, or worse, or not at all affected, by usage; since, if *Caius* deposit a *setting-dog* with *Titius*, he can hardly be supposed unwilling that the dog should be used for partridge-shooting, and thus be confirmed in those habits which [81] make him valuable; but, if *clothes* or *linen* be deposited by him, one can scarce imagine that he would suffer them to be worn; and on the other hand it may justly be

[x] Yearb. 21 Hen. VII. 14. b. 15. a.

inferred, that he would gladly indulge *Titius* in the liberty of using the *books* of which he had the custody, since even moderate care would prevent them from being injured. In the same manner it has been holden, that the pawnee of goods, which will be *impaired* by usage, cannot use them; but it would be otherwise, I apprehend, if the things pawned actually *required* exercise and a continuance of habits, as sporting-dogs and horses: if they cannot be hurt by being worn, they may be used, but *at the peril* of the pledgee; as, if chains of gold, ear-rings, or bracelets, be left in pawn with a lady, and she wear them at a public place, and be *robbed* of them on her return, she must make them good: "if she keep them in "a bag," says a learned and respectable writer, "and they are *stolen*, she shall "not be charged [*y*];" but the bag could

[*y*] Law of *Nisi Prius*, 72.

hardly

hardly be taken *privately and quietly* without her omission of *ordinary* diligence; and the manner in which Lord *Holt* puts the case establishes my system, and confirms the answer just offered to the case from the Year-book; for, "if she keep the "jewels," says he, "*locked up* in her cabi- "net, and her cabinet be *broken open*, and "the jewels taken thence, she will not be [82] "answerable [z]." Again; it is said, that, where the pawnee is at any expence to maintain the thing given in pledge, as, if it be a horse or a cow, he may ride the horse moderately, and milk the cow regularly, by way of compensation for the charge [a]; and this doctrine must be equally applicable to a general bailee, who ought neither to be injured nor benefited in any respect by the trust undertaken by him; but the *Roman* and *French* law, more agreeably to principle and analogy,

[z] Ld. Raym. 917. [a] Ow. 124.

permits

permits indeed both the pawnee and the depositary to milk the cows delivered to them, but requires them to account with the respective owners for the value of the milk and calves, deducting the reasonable charges of their nourishment [*b*]. It follows from these remarks, that Lord *Coke* has assigned an inadequate reason for the degree of diligence which is demanded of a pawnee; and the true reason is, that the law requires nothing *extraordinary* of him.

But, if the receiver in pledge *were* the only bailee who had a *special property* in the thing bailed, it could not be logically inferred, "that, *therefore*, he ought to "keep it merely *as his own*:" for, even if *Caius* have an *absolute* undivided property in goods, jointly or in common with *Septimius*, he is bound by rational, as well

[*b*] Poth. *Dépôt*, n. 47. *Nantissement*, n. 35.

as

as positive, law to take *more* care of them *than of his own*, unless he be in fact a prudent and thoughtful manager of his own concerns: since every man ought to use *ordinary* diligence in affairs which interest *another* as well as himself: "*Aliena* "negotia," says the emperor CONSTANTINE, "*exacto* officio geruntur [*c*]."

The conclusion, therefore, drawn by Sir *Edward Coke*, is no less illogical than his premises are weak; but here I must do M. *Le Brun* the justice to observe, that the argument, on which his whole system is founded, occurred likewise to the great oracle of *English* law; namely, that a person who had a *property* in things committed to his charge, was only obliged to be *as careful of them as of his own* goods; which may be very true, if the sentence be predicated of a man *ordinarily* careful

[*c*] C. 4. 35. 21.

of

of his own; and, if that was *Le Brun's* hypothesis, he has done little more than adopt the system of *Godefroi*, who exacts *ordinary* diligence from a *partner* and a *co-proprietor*, but requires a *higher* degree in eight of the ten preceding contracts.

Pledges for debt are of the highest antiquity: they were used in very early times by the roving *Arabs*, one of whom finely remarks, "that the life of Man is no "more than a *pledge* in the hands of "Destiny (31);" and the salutary laws

(31) This sentiment is peculiarly oriental: it is naturally suggested by the hazardous vicissitudeswhich attend the pursuits of the wandering Arab. Under its *religious* influence the believers in Mahomet have fiercely encountered the dangers of battle, or have supinely fallen by the ravages of the plague: it has tolerated the horrors of a bloody and degrading despotism, and it supplies the "*carpe diem*" in the voluptuous effusions of the Eastern poets. The moral it contains is more properly applied, and very pathetically dilated, in the Book of Job.

of

of MOSES, which forbade certain implements of husbandry and a widow's raiment to be given in pawn, deserve to be [84] imitated as well as admired. The distinction between *pledging*, where possession is transferred to the creditor, and *hypothecation*, where it remains with the debtor, was originally *Attic;* but scarce any part of the *Athenian* laws on this subject can be gleaned from the ancient orators, except what relates to bottomry in five speeches of *Demosthenes*.

Turkish law.

I cannot end this article without mentioning a singular case from a curious manuscript preserved at *Cambridge*, which contains a collection of queries in *Turkish*, together with the decisions or concise answers of the MUFTI at *Constantinople:* it is commonly imagined, that the *Turks* have a translation in their own language of the *Greek* code, from which they have supplied

the defects of their *Tartarian* and *Arabian* jurisprudence [*d*]; but I have not met with any such translation, although I admit the conjecture to be highly probable, and am persuaded, that their numerous treatises on *Mahomedan* law are worthy, on many accounts, of an attentive examination. The case was this: "*Zaid* had left with *Amru* "divers goods in pledge for a certain sum "of money, and some *ruffians*, having "entered the house of *Amru*, took away "his own goods together with those pawn-"ed by *Zaid*." Now we must necessarily suppose, that the creditor had by *his own fault* given occasion to this robbery; other-
[85] wise we may boldly pronounce, that the *Turks* are wholly unacquainted with the imperial laws of *Byzantium*, and that their own rules are totally repugnant to natural justice; for the party proceeds to ask, "whether, *since the debt became extinct by*

[*d*] *Duck* de Auth. Jur. Civ. Rom. I. 2. 6.

"*the*

" *the loss of the pledge*, and since the goods " pawned exceeded in value the amount " of the debt, *Zaid* could legally demand " the balance of *Amru*;" to which question the great law-officer of the *Othman* court answered with the brevity usual on such occasions, OLMAZ, *It cannot be* [*e*]. This custom, we must confess, of proposing cases both of law and conscience under *feigned* names to the supreme judge, whose answers are considered as solemn *decrees*, is admirably calculated to prevent partiality, and to save the charges of litigation.

Law of hiring.

V. The last species of bailment is by no means the least important of the five, whether we consider the infinite convenience and daily use of the contract itself,

[*e*] Publ. Libr. Cambr. MSS. Dd. 4. 3. See Wotton, LL. *Hywel Dda*. lib. 2. cap. 2. § 29. *note* x. It may *possibly* be the usage in *Turky* to *stipulate* " ut amissio pig- " noris liberet debitorem," as in C. 4. 24. 6.

or the variety of its branches, each of which shall now be succinctly, but accurately, examined.

Hiring of a THING.

1. *Locatio*, or *locatio-conductio*, REI, is a contract by which the hirer gains a transient qualified property in the *thing* hired, and the owner acquires an absolute property in the stipend, or price, of the
[86] hiring; so that, in truth, it bears a strong resemblance to the contract of *emptio-venditio*, or SALE; and, since it is advantageous to *both* contracting parties, the harmonious consent of nations will be interrupted, and one object of this Essay defeated, if the laws of *England* shall be found, on a fair inquiry, to demand of the hirer a *more than ordinary* degree of diligence. In the most recent publication that I have read on any legal subject, it is expressly said, "that the hirer is to "take *all imaginable* care of the goods "delivered

" delivered for hire [*f*]:" the words *all imaginable*, if the principles before established be just, are too strong for practice even in the strict case of *borrowing;* but, if we take them in the mildest sense, they must imply an *extraordinary* degree of care; and this doctrine, I presume, is founded on that of Lord *Holt* in the case of *Coggs and Bernard*, where the great judge lays it down, " that, if goods are " let out for a *reward*, the *hirer* is bound " to the UTMOST diligence, such as the " MOST *diligent father of a family* uses [*g*]." It may seem bold to controvert so respectable an opinion: but, without insisting on the palpable injustice of making a *borrower* and a *hirer* answerable for precisely the *same* degree of neglect, and without urging that the point was not then before the

Lord Holt's doctrine explained.

[*f*] Law of *Nisi Prius*, 3d edition corrected, 72.
[*g*] Ld. Raym. 916.

court,

court, I will engage to show, by tracing the doctrine up to its real source, that the *dictum* of the Chief Justice was entirely
[87] grounded on a grammatical mistake in the translation of a single *Latin* word.

In the first place, it is indubitable that his lordship relied *solely* on the authority of *Bracton*; whose words he cites at large, and immediately subjoins, "*whence it ap-*" *pears, &c.*" now the words "talis ab "eo desideratur custodia, qualem DILI-" GENTISSIMUS *paterfamilias* suis rebus "adhibet," on which the whole question depends, are copied exactly from *Justinian* [*b*], who informs us in the *proeme* to his Institutes, that his decisions in that work were extracted *principally from the Commentaries of* GAIUS; and the epithet

[*b*] Bract. 62. b. Justin. Inst. 3. 25. 5. where *Theophilus* has ὁ σοφοδρα ἐπιμελέστατος.

dili-

diligentissimus is in fact used by this ancient lawyer [*i*], *and by him alone*, on the subject of hiring: but *Gaius* is remarked for writing with energy, and for being fond of using *superlatives* where all other writers are satisfied with *positives* [*k*]; so that his forcible manner of expressing himself, in this instance as in some others, misled the compilers employed by the Emperor, whose words *Theophilus* rendered more than literally, and *Bracton* transcribed; and thus an epithet which ought to have been translated *ordinarily* diligent, has been supposed to mean *extremely* careful. By rectifying this mistake, we restore the broken harmony of the *Pandects* with the *Institutes*, which, together with the *Code*, form *one connected work* [*l*], and, when properly understood, explain and illustrate each other; nor is it necessary, I conceive, to [88]

[*i*] D. 19. 2. 25. 7. [*k*] Le Brun, p. 93.
[*l*] Burr. 426.

adopt

adopt the interpretation of M. DE FERRIERE, who imagines, that both *Justinian* and *Gaius* are speaking only of cases, which *from their nature* demand *extraordinary* care [*m*].

Rules and remarks.

There is no authority then against the rule, which requires of a *hirer* the same degree of diligence that *all prudent men*, that is, *the generality of mankind*, use in keeping their own goods; and the just distinction between *borrowing* and *hiring*, which the *Jewish* lawgiver emphatically makes, by saying, "if it be an hired "thing, *it came for its hire* [*n*]," remains established by the concurrent wisdom of nations in all ages.

If *Caius*, therefore, hire a horse, he is bound to ride it as moderately and treat it as carefully, as any man of *common dis-*

[*m*] *Inst.* vol. v. p. 138. [*n*] Exod. xxii. 15.

cretion

cretion would ride and treat *his own* horse; and if, through his negligence, as by leaving the door of his stable open at night, the horse be *stolen*, he must answer for it; but not, if he be *robbed* of it by highwaymen, unless by his imprudence he gave occasion to the robbery, as by travelling at unusual hours, or by taking an unusual road: if, indeed, he hire a carriage and any number of horses, and the owner send with them his postilion or [89] coachman, *Caius* is discharged from all attention to the horses, and remains obliged only to take ordinary care of the glasses and inside of the carriage, while he sits in it.

Since the negligence of a servant, *acting under his master's directions express or implied*, is the negligence of the master, it follows, that, if the *servant* of *Caius* injure or kill the horse by riding it immoderately,

or, by leaving the stable-door open, suffer thieves to steal it, *Caius* must make the owner a compensation for his loss [*o*]; and it is just the same if he take a ready-furnished lodging, and his guests, or servants, while they act under the authority given by him, damage the furniture by the omission of ordinary care. At *Rome* the law was not quite so rigid; for POMPONIUS, whose opinion on this point was generally adopted, made the master liable only *when he was culpably negligent in admitting careless guests or servants*, whose bad qualities he ought to have known [*p*]: but this distinction must have been perplexing enough in practice; and the rule which, by making the head of a family answerable indiscriminately for the faults of those whom he receives or employs, compels him to keep a vigilant eye on all his domestics,

[*o*] Salk. 282. Ld. Raym. 916.
[*p*] D. 19. 2. 11.

is not only more simple, but more conducive to the public security, although it may be rather harsh in some particular instances [q]. It may here be observed, that this is the only contract to which the *French*, from whom our word *bailment* was borrowed, apply a word of the same origin; for the letting of a house or chamber for hire is by them called *bail à loyer*, and the letter for hire, *bailleur*, that is *bailor*, both derived from the old verb *bailler*, to deliver; and though the contracts which are the subject of this Essay, be generally confined to *moveable* things, yet it will not be improper to add, that, if *immoveable* property, as an orchard, a garden, or a farm, be letten by parol, with no other stipulation than for the price or rent, the lessee is bound to use the same diligence (32) in [90]

[q] Poth. *Louage*, n. 193.

(32) It should seem that upon a similiar principle the Chief Justice, in the case of Chetham v. Hampson,

in preserving the trees, plants, or implements, that *every prudent person* would use, if the orchard, garden, or farm, were his own.

Hiring of work.

2. *Locatio* OPERIS, which is properly subdivisible into two branches, namely, *faciendi*, and *mercium vehendarum*, has a most extensive influence in civil life; but the principles, by which the obligations of the contracting parties may be ascertained, are no less obvious and rational,

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son, 4 Term. Rep. 319, observes, "It is so notoriously the duty of the actual occupier to *repair* "*the fences*, and so little the duty of the landlord, "that, *without any agreement to that effect*, the landlord may maintain an action against the tenant for "not so doing, upon the ground of the injury done "to the inheritance." See also the case of Powley v. Walker, 5 Term Rep. 373, in which it was decided that the "*mere relation* of landlord and tenant" was a consideration to entitle the plaintiff to recover damages in an action of assumpsit "for not "managing a farm in an husbandlike manner."

than

than the objects of the contract are often vast and important [r].

If *Titius* deliver silk or velvet to a tailor [91] for a suit of clothes, or a gem to a jeweller to be set or engraved, or timber to a carpenter for the rafters of his house, the tailor, the engraver, and the builder, are not only obliged to perform their several undertakings in a workmanly manner [s], but, *since they are entitled to a reward*, either by express bargain or by implication

[r] It may be useful to mention a nicety of the *Latin* language in the application of the verbs *Locare* and *conducere*: the employer, who gives the reward, is *locator operis*, but *conductor operarum*; while the party employed, who receives the pay, is *locator operarum*, but *conductor operis*. Heinecc. in *Pand.* par. 3. § 320. So, in *Horace*,

"Tu secanda marmora
"*Locas*"—

which the stonehewer or mason *conduxit*.

[s] 1 Ventr. 268. erroneously printed 1 *Vern.* 268. in all the editions of *Bl Com.* ii. 452. The innumerable multitude of inaccurate or idle references in our best reports and law-tracts, is the bane of the student and of the practiser.

they

they must also take *ordinary* care of the things respectively bailed to them: and thus, if a horse be delivered either to an agisting farmer for the purpose of depasturing in his meadows, or to an hostler to be dressed and fed in his stable, the bailees are answerable for the loss of the horse, if it be occasioned by the *ordinary* neglect of themselves or their servants. It has, indeed, been adjudged, that, if the horse of a guest be sent *to pasture* by *the owner's desire*, the innholder is not, as
[92] *such*, responsible for the loss of him by *theft* or accident [*t*]; and in the case of *Mosley* and *Fosset*, an action against an agister for keeping a horse *so negligently that it was stolen*, is said to have been held maintainable *only* by reason of a *special* assumption [*u*]; but the case is differently reported by *Rolle*, who mentions no such

[*t*] 8 Rep. 32. *Caye*'s case.
[*u*] Mo. 543. 1 Ro. Abr. 4.

reason;

reason; and, according to him, Chief Justice *Popham* advanced generally, in conformity to the principles before established, that, "if a man, to whom horses are "bailed for agistment, *leave open the gates* "*of his field*, in consequence of which "neglect they stray and are *stolen*, the "owner has an action against him:" it is the same if the innkeeper send his guest's horse to a meadow *of his own accord*, for he is bound to keep safely all such things as his guests deposit *within his inn* (33),

Law concerning innholders.

(33) "Although the guest doth not deliver his "goods to the innkeeper to keep," is the doctrine laid down in *Cayle's Case*, 8 Rep. 33, § 4. The law of this case was recognized in *Bennet v. Mellor*, 5 Term Rep. 273, where it was determined that "if an innkeeper refuse to take charge of goods till "a future day, because his house is full of parcels, "still he is liable to make good the loss if the owner "stop as a *guest*, and the goods be stolen during his "stay." This latter case was so peculiarly circumstanced, as to produce the individual hardship, which sometimes occurs in the necessarily rigorous construction of laws founded on principles of public policy.

and

and shall not discharge himself by his own act from that obligation; and even when he turns out the horse *by order of the owner*, and receives pay for his grass and care, he is chargeable, surely, for *ordinary* negligence, as *a bailee for hire*, though not *as an inkeeper* by the general custom of the realm. It may be worth while to investigate the reasons of this *general custom*, which, in truth, means no more than *common law*, concerning innholders [*w*].

Although a stipend or reward in *money* be the essence of the contract called *locatio*,
[93.] yet the same responsibility for neglect is justly demanded in any of the *innominate* contracts, or whenever a valuable consideration of any kind is given or stipulated. This is the case where the contract *do ut des* is formed by a *reciprocal bailment for use;* as if *Robert* permit *Henry* to use his

[*w*] Reg. Orig. 105. a. Noy, Max. ch. 43.

pleasure-

pleasure-boat for a day, *in consideration* that *Henry* will give him the use of his *chariot* for the same time; and so in ten thousand instances, that might be imagined, of *double bailments:* this too is the case if the *absolute* property of one thing be given as an equivalent for the *temporary* or limited property of another, as if *Charles* give *George* a brace of pointers for the use of his *hunter* during the season. The same rule is applicable to the contract *facio ut facias*, where two persons agree to perform *reciprocal works*; as if a mason and a carpenter have each *respectively* undertaken to build an edifice, and they mutually agree, that the first shall finish all the masonry, and the second all the woodwork, in their respective buildings; but, if a goldsmith make a bargain with an architect to give him a quantity of wrought plate for building his house, this is the contract *do ut facias*, or *facio ut des;* and in

all these cases, the bailees must answer for the omission of *ordinary* diligence in preserving the things with which they are intrusted: so, when *Jacob* undertook the care of *Laban*'s flocks and herds for no less a reward than his younger daughter,
[94] whom he loved so passionately, *that seven years were in his eyes like a few days*, he was bound to be just as vigilant as if he had been paid in shekels of silver.

Now the obligation is precisely the same, as we have already hinted [*x*], when a man takes upon himself the custody of goods *in consequence and consideration of another gainful contract*; and though an innholder be not paid in *money* for securing the traveller's trunk, yet the guest *facit ut faciat*, and alights at the inn, not solely for his own refreshment, but also that his goods may be safe: independently of this

[*x*] P. 49, 50.

reasoning

reasoning, the custody of the goods may be considered as *accessary* to the principal contract, and the money paid for the apartments as extending to the care of the box or portmanteau; in which light *Gaius* and, as great a man as he, Lord *Holt*, seem to view the obligation; for they agree, "that, although a bargeman "and a master of a ship receive their "fare for the passage of travellers, and "an innkeeper his pay for the accom-"modation and entertainment of them, "but have no pecuniary reward for the "*mere custody* of the goods belonging to "the passengers or guests, yet they are "obliged to take *ordinary* care of those "goods; as a fuller and a mender are "paid for their *skill only*, yet are answer-"able, *ex locato*, for *ordinary* neglect, if "the clothes be lost or damaged [*y*],"

[*y*] D. 4. 9. 5. and 12 Mod. 487.

In whatever point of view we consider this bailment, no more is *regularly* demanded of the bailee than the care which *every prudent man* takes of his own property; but it has long been holden, that an *innkeeper* is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through one of his agents, be damaged *in his inn*, or *stolen out of it* by *any person whatever* [z]: nor shall he discharge himself from this responsibility by a refusal to take any care of the goods, *because there are suspected persons in the house for whose conduct he cannot be answerable* [a]; it is otherwise, indeed, if he refuse admission to a traveller because he really has no room for him, and the traveller, nevertheless, insist upon entering, and place his baggage in a chamber without the keeper's consent [b].

[z] Yearb. 10 Hen. VII. 26. 2 Cro. 189.
[a] Mo. 78. [b] Dy. 158. b. 1 And. 29.

Add

Add to this, that, if he fail to provide honest *servants* and honest *inmates*, according to the confidence reposed in him by the public, his negligence in that respect is highly culpable, and he ought to answer *civilly* for their acts, even if they should *rob* the guests who sleep in his chambers [*c*]. Rigorous as this law may seem, and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all [96] private considerations ought to yield; for travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of

[*c*] 1 Bl. Comm. 430.

their

their *negligence*, if no actual fraud had been committed by them. Hence the Prætor declared, according to POMPONIUS, *his desire of securing the public from the dishonesty of such men*, and by his *edict* gave an action against them, if the goods of travellers or passengers were lost or hurt by any means, except *damno fatali* or by *inevitable accident;* and *Ulpian* intimates, that even this severity could not restrain them from knavish practices or suspicious neglect [*d*].

In

[*d*] D. 4. 9. 1. and 3. (34)

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(34) The comment, and the complaint, of Ulpian are thus expressed: "Maxima utilitas est hujus edicti; "quia necesse est plerumque eorum fidem sequi, et "res custodiæ eorum committere. Neque quisquam "putet graviter hoc advers s eos constitutum: *nam* "*est in ipsorum arbitrio, ne quem recipiant*, et nisi hoc "esset statutum, materia daretur cum furibus, ad-"versùs eos quos recipiunt, coëundi: cùm ne nunc "quidem abstineant hujusmodi fraudibus." It will be obvious that the part of Ulpian's reason "*nam est*," &c. includes an option of receiving or refusing guests, in which the Roman *caupones* differed from our mo-

dern

In all such cases, however, it is competent for the innholder to repel the *presumption* of his knavery or default, by *proving* that he took *ordinary* care, or that the *force*, which occasioned the loss or damage, was truly *irresistible*.

When a private man demands and receives a compensation for the *bare custody* of goods in his warehouse or store-room, this is *not* properly a *deposit*, but a *hiring of care and attention*: it may be called *locatio custodiæ*, and might have been made [97] a distinct branch of this last sort of bailment, if it had not seemed useless to multiply subdivisions; and the bailee may still be denominated *locator operæ*, since the *vigilance and care*, which he *lets out* for

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dern innkeepers, the latter being liable to an action if they refuse, without an adequate reason, to admit and accommodate a traveller. Black. Com. vol. 3. p. 164. 5 Term Rep. 276.

pay,

pay, are in truth a mental *operation*. Whatever be his appellation, either in *English* or *Latin*, he is clearly responsible, like other interested bailees, for *ordinary* negligence; and although St. *German* seems to make no difference in this respect between *a keeper of goods for hire* and *a simple depositary*, yet he uses the word DEFAULT, like the CULPA of the *Romans*, as a generical term, and leaves the *degree* of it to be ascertained by the rules of law [*e*].

Remarks on St. German.

In the sentence immediately following, he makes a very material distinction between the two contracts; for, "if a man," says he, "have *a certain recompence* for "the keeping of goods, and promise, at "the time of delivery, *to redeliver them* "*safe at his peril*, then he shall be charged "with *all chances* that may befall; but if "he make *that* promise, and *have nothing*

[*e*] *Doct.* and *Stud.* where before cited.

"for

"for keeping them, he is bound to *no* "*casualties* (35) but such as are wilful, "and happen *by his own default:*" now the word PERIL, like *periculum*, from which it is derived, is in itself ambiguous, and sometimes denotes the *risk* of *inevitable mischance*, sometimes the *danger* arising [98] from *a want of due circumspection;* and *the stronger sense* of the word *was taken* in the first case *against him who uttered it;* but in the second, where the construction is favourable, the *milder* sense was justly preferred [*f*]. Thus when a person, who, if he were wholly *uninterested*, would be a *mandatary*, undertakes for a *reward* to perform *any work*, he must be considered as bound still more strongly *to use a degree of diligence adequate to the performance of*

[*f*] See before, p. 45.

(35) See "*Garside* v. *the Proprietors of the Trent* "*and Mersey Navigation*," 4 Term Rep. 389.

it: his obligation must be rigorously construed, and he would, perhaps, be answerable for *slight* neglect, where no more could be required of a *mandatary* than *ordinary* exertions. This is the case of commissioners, factors, and bailiffs, when their undertaking *lies in fesance*, and not simply in *custody:* hence, as peculiar care is demanded in removing and raising a fine column of granate or porphyry, without injuring the shaft of the capital, *Gaius* seems to exact *more than ordinary* diligence from the undertaker of such a work for a stipulated compensation [*g*]. Lord *Coke* considers a factor in the light of a *servant*, and thence deduces his obligation; but, with great submission, his *reward* is the true reason, and *the nature of the business* is the just measure, of his duty [*h*]; which cannot, however, extend to a responsibility

Law concerning factors and traders.

[*g*] D. 19. 2. 7.
[*h*] 4 Rep. 84. Ld. Raym. 918.

for

for *mere accident* or *open robbery* [*i*]; and even in the case of *theft*, a factor has been holden excused when he shewed "that he "had *laid up* the goods of his principal "in a warehouse, out of which they were "*stolen* by certain malefactors to him un-"known [*k*]."

Where *skill* is required, as well as *care*, in performing the work undertaken, the bailee for *hire* must be supposed to have engaged himself for *a due application of the necessary art:* it is his own fault if he undertake a work above his strength; and all that has before been advanced on this head concerning a *mandatary*, may be applied with much greater force to a *conductor operis faciendi* [*l*]. I conceive, however, that, where the bailor has not been de-

[*i*] 1 Inst. 89. a.

[*k*] 1 Vent. 121. *Vere* and *Smith*.

[*l*] *Spondet*, say the *Roman* lawyers, *peritiam artis*.

luded

luded by any but himself, and voluntarily employs in one art a man who openly exercises another, his folly has no claim to indulgence; and that, unless the bailee make false pretensions, or a *special* undertaking, no more can fairly be demanded of him than the best of his ability [*m*]. The case which SADI relates with elegance and humour in his *Gulistan* or *Rose-garden*, and which *Puffendorf* cites with approbation [*n*], is not inapplicable to the present
[100] subject, and may serve as a specimen of *Mahomedan law*, which is not so different from ours as we are taught to imagine:

Mahomedan law.

'A man who had a disorder in his eyes, 'called on a *farrier* for a remedy; and 'he applied to them a medicine commonly 'used for *his* patients: the man lost his 'sight, and brought an action for da-'mages; but the judge said, "No action

[*m*] P. 54.

[*n*] De Jure Nat. et Gent. lib. 5. cap. 5. § 3.

"lies,

" lies, for if the complainant had not him-
" self been an *ass*, he would never have
" employed a *farrier*;" and *Sadi* proceeds to intimate, that " if a person will employ
" a common *mat-maker* to weave or em-
" broider *a fine carpet*, he must impute the
" bad workmanship to his own folly [*o*]."

In regard to the distinction before-mentioned between the *non*-fesance and the *mis*-fesance of a workman [*p*], it is *indisputably* clear, that an action lies in *both* cases for a reparation in damages, whenever the work was undertaken for a *reward*, either actually paid, *expressly* stipulated, or in the case of a *common* trader, strongly *implied*;

[*o*] Rosar. Polit. cap. 7. There are numberless tracts in *Arabic*, *Persian*, and *Turkish*, on every branch of jurisprudence; from the best of which it would not be difficult to extract a complete system, and to compare it with our own: nor would it be less easy to explain in *Persian* or *Arabic* such parts of our *English* law, as either coincide with that of the *Asiatics*, or are manifestly preferable to it.

[*p*] P. 54, &c.

of

of which BLACKSTONE gives the following instance: "If a *builder* promises, undertakes, or assumes to *Caius*, that he "will build and cover his house within "a time limited, and fails to do it, *Caius* "has an action on the case against the "builder for this breach of his express "promise, and shall recover a pecuniary "satisfaction for the injury sustained by "such delay [*q*]." The learned author meaned, I presume, a *common* builder (36), or

[*q*] 3 Comm. 157.

(36) See "*Elsee* v. *Gatward*," 5 Term Rep. 150. The first count of the declaration in that case, and upon which it principally turned, alleged, that the defendant, who was a carpenter, was retained by the plaintiffs to build and to repair certain houses, but it was not stated that he was to receive *any consideration*, or that he *entered upon* his work. Lord Kenyon observed, "no consideration results from the defendant's situation as a carpenter, nor is he bound to "perform all the work that is tendered to him." Mr. Justice Ashhurst, in giving his opinion on the same case, remarked the following distinctions: "If a party "undertake to perform work, and proceed on the "employ-

or supposed a *consideration* to be given; and for this reason I forbore to cite his doctrine as in point on the subject of an action for the *non*-performance of a *mandatary* [*r*].

Rules and distinctions.

Before we leave this article, it seems proper to remark, that every bailee for *pay*, whether *conductor rei* or *conductor operis*, must be supposed to know, that the goods and chattels of his bailor are in *many* cases

[*r*] P. 56. 57. 61.

"employment, he makes himself liable for any *mis-*
"*fesance* in the course of that work: but, if he un-
"dertake, and do not proceed on the work, no action
"will lie against him for the *nonfesance*.—In this
"case the defendant's undertaking was merely volun-
"tary, no consideration for it being stated.—There
"was no custom of the realm, or any legal obligation
"to compel him to perform this work, and that dis-
"tinguishes this case from those of a *common* carrier,
"porter, and ferryman, *who are bound by their situ-*
"*ations in life* to perform the work tendered to them;
"but *a carpenter*, as such, is not bound by any such
"obligation."

distrainable

distrainable for rent, if his landlord, who might otherwise be shamefully defrauded, find them on the premises [*s*]; and, as they cannot be distrained and sold without his *ordinary* default *at least*, the owner has a remedy over against him, and must receive a compensation for his loss [*t*]: even if a *depositary* were to remove or conceal *his own* goods, and those of his depositor were to be seized for rent-arrere, he would unquestionably be bound to make restitu-
[102] tion; but there is no obligation in the bailee to *suggest wise precautions against inevitable accident;* and he cannot, therefore, be obliged *to advise insurance from fire;* much less *to insure* the things bailed without an authority from the bailor.

It may be right also to mention, that the distinction, before taken in regard to

[*s*] Burr. 1498, &c. [*t*] 3 Bl. Comm. 8.

loans,

loans [*u*], between an obligation to restore the *specific* things, and a power or necessity of returning *others equal in value*, holds good likewise in the contracts of *hiring* and *depositing:* in the first case, it is a regular *bailment;* in the second, it becomes a *debt.* Thus, according to ALFENUS in his famous law, on which the judicious *Bynkershoek* has learnedly commented, "if "an ingot of silver be delivered to a silver- "smith to make an urn, the *whole* pro- "perty is transferred, and the employer "is only a *creditor* of metal equally va- "luable, which the workman engages to "*pay* in a certain shape [*w*]:" the smith may consequently apply it to his own use; but, if it perish, even by unavoidable mischance or irresistable violence, he, as owner of it, must abide the loss, and the creditor

Celebrated law of Alfenus.

[*u*] P. 64, 65.

[*w*] D. 19. 2. 31. Bynk. *Obs. Jur. Rom.* lib. VIII.

must have his urn in due time. It would be otherwise, no doubt, if the *same* silver, on account of its peculiar fineness, or any uncommon metal, according to the whim
[103] of the owner, were agreed to be *specifically* redelivered in the form of a cup or a standish.

Hiring of CARRIAGE.

3. *Locatio operis* MERCIUM VEHENDARUM is a contract which admits of many varieties in *form*, but of none, as it seems *at length* to be settled, in the *substantial* obligations of the bailee.

A *carrier for hire* ought, by the rule, to be responsible only for *ordinary* neglect; and in the time of HENRY VIII., it appears to have been generally holden, "that "a *common* carrier was chargeable, in case "of a loss by *robbery*, only when he had "travelled by *ways dangerous for robbing*, "or

"or driven by *night*, or at any *incon-* "*venient hour* [*x*]:" but in the commercial reign of ELIZABETH, it was resolved, upon the same broad principles of policy and convenience that have been mentioned in the case of *innholders*, "that, "if a *common carrier* be *robbed* of the "goods delivered to him, he shall answer "for the value of them [*y*]."

Now the *reward* or *hire*, which is considered by *Sir Edward Coke* as the reason of this decision, and on which the principal stress is often laid in our own times, makes the carrier liable, indeed, for the omission of *ordinary* care, but cannot extend to *irresistible force*; and though some other bailees have a *recompence*, as *factors* and *workmen for pay*, yet even in *Woodliefe's* [104]

[*x*] Doct. and Stud. where often before cited.

[*y*] 1 Inst. 89. a. Mo. 462. 1 Ro. Abr. 2. *Woodliefe* and *Curties*.

case the Chief Justice admitted, that *robbery* was a good plea for a *factor*, though it was a bad one for a *carrier:* the true ground of that resolution is the *public employment* exercised by the carrier, and the danger of his combining with *robbers* to the infinite injury of commerce and extreme inconvenience of society [z].

Exceptions from the general rule.

The modern rule concerning a *common* carrier is, that "nothing will excuse him, "except *the act of* GOD (37), or of *the* "*King's*

[z] Ld. Raym. 917. 12 Mod. 487.

(37) See the case of "*Forward* v. *Pittard*," 1 Term Rep. 27, where the excuse founded on the "Act of God" is very fully considered, and where the defendant, a common carrier, was held answerable, "*in the nature of an insurer*," for goods which were *accidentally* consumed by fire. A similar decision was given in the case of "*Hyde* v. *the Trent and* "*Mersey Navigation Company*, 2 Term Rep. 389. These two cases differed in circumstances, but were both governed by the contract of undertaking *to deliver*,

"*King's enemies* [*a*];" but a momentary attention to the principles must convince us, that this exception is in truth part of the rule itself, and that the responsibility for a loss by *robbers* is only an exception to it: a carrier is *regularly* answerable for neglect, but not, *regularly*, for damage occasioned by the attacks of *ruffians*, any more than for *hostile* violence or unavoidable *misfortune;* but the great maxims of

[*a*] Law of *Nisi Prius*, 70, 71.

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liver, it appearing in evidence, that the goods had not reached the place of their *final* destination. Where, however, goods not having arrived at the place of final delivery, are out of the custody of the carrier *as such*, this construction does not apply; and it was accordingly determined in the case of "*Carside* v. *the Proprietors of the Trent and Mersey Navigation*," 4 Term R. 389. that a common carrier *between* A. and B. employed to carry goods *from A. to B.*, to be forwarded to a third place *(by another carrier, according to the custom)*, and putting them *gratuitously* in his warehouse at B., where they were *accidentally* destroyed by fire, *before he had an opportunity of forwarding them*, was not responsible for the loss.

policy

policy (38) and good government make it necessary to *except* from this rule the case of *robbery*, lest confederacies should be formed between carriers and desperate villains with little or no chance of detection.

Although the *act of God*, which the ancients too called Θεοῦ βίαν and *vim divinam*, be an expression, which long habit has rendered familiar to us, yet perhaps, on that very account, it might be more proper,
[105] as well as more decent, to substitute in its place *inevitable accident*: religion and rea-

(38) Upon similar grounds of policy it is settled, that nothing can excuse a gaoler from responsibility in an action of debt for the escape of a prisoner in execution, but "*the act of God or of the King's enemies.*" See the case of "*Alfept* v. *Eyles*," 2 *H. Black. Rep.* 108; and "*Elliot* v. *the Duke of Norfolk*," 4 *Term Rep.* 789. See also the argument of Lord Chief Justice Wilmot in "*Drinkwater* v. *the Corporation of the London Assurance*," 2 *Wilson*, 363; and Lord Mansfield's address to the jury in the cause of "*Langdale* v. *Mason and others*," *at Guildhall, Trin. Vac.* 1780; *Park on Insurance*, 3*d edition*, *p.* 446.

son,

son, which can never be at variance without certain injury to one of them, assure us, that "not a gust of wind blows, nor "a flash of lightning gleams, without the "knowledge and guidance of a superintending mind;" but this doctrine loses its dignity and sublimity by a technical application of it, which may, in some instances, border even upon profaneness; and law, which is merely a practical science, cannot use terms too popular and perspicuous (39).

In

(39) Long use seems to have rendered the legal sense and meaning of the words "act of God" sufficiently perspicuous, and would perhaps, make the substitution of others attended with inconvenience. It must be admitted, generally, that the "technical application" of solemn expressions is highly indecorous; but if, beside *theology*, there be any science, in treating of which such expressions are allowable, it is *law*. The daily affairs of life evince how intimately and necessarily the sanctions of religion are practically blended with human jurisprudence: the rational connexion between them is devoutly intimated by Justinian (Procem. ad Instit.),

In a recent case of an action against a carrier, it was holden to be no excuse, "that the ship was tight when the goods "were placed on board, but that a rat, "by gnawing out the oakum, had made "a small hole, through which the water "had gushed [*b*];" but the true reason of this decision is not mentioned by the reporter: it was, in fact, *at least ordinary* negligence, to let a rat do such mischief in the vessel; and the *Roman* law has, on this principle, decided, that, "si fullo ves- "timenta polienda acceperit, eaque *mures* "*roserint*, ex locato tenetur, quia *debuit* "*ab hac re cavere* [*c*]."

[*b*] 1 Wils. part 1. 281. *Dale* and *Hall.*

[*c*] D. 19. 2. 13. 6.

Instit.), and sublimely personified in a much admired passage of an English classic—"Of Law no less can "be acknowledged than that her seat is the bosom of "God, and her voice the harmony of the world; all "things in heaven and on earth do her homage, the "very least, as feeling her care, and the greatest, as "not exempted from her power." (Hooker, Ecc. Pol.)

Whatever

Whatever doubt there may be among civilians and common-lawyers in regard to *a casket, the contents of which are concealed from the* DEPOSITARY [*d*], it seems [106] to be generally understood, that *a common carrier is* answerable for the loss of a box or parcel, be he ever so *ignorant of its contents*, or be those contents ever so valuable, *unless* he make a *special* acceptance [*e*]: but *gross fraud and imposition* by the bailor will deprive him of his action, and if there be proof that the parties were apprised of each other's intentions, although there was no personal communication, the bailee may be considered as a *special* acceptor: this was adjudged in a very modern case particularly circumstanced, in which the former cases in *Ventris*, *Alleyne*, and *Carthew*, are examined with liberality and wisdom; but, in all of them, too great

[*d*] Before, p. 37, 38, 39.

[*e*] 1 Stra. 145. *Titchburn* and *White*.

stress

stress is laid on the *reward*, and too little on the important motives of *public utility*, which alone distinguish a *carrier* from other *bailees for hire* [*f*].

Though

[*f*] Burr. 2298. *Gibbon* and *Paynton*. See 1 Vent. 238. All. 93. Carth. 485. (40)

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(40) See the case of *Clay* v. *Willan and others*, 1 H. Black. Rep. 298. An action in the usual form against *common carriers* was brought against the defendants, who were proprietors of a stage coach: they had published printed proposals, mentioning "that cash, writings, &c. and similar valuable articles, *exceeding the sum of* 5*l. would not be accounted for if lost, unless entered as such, and a penny insurance paid for each pound value*," when delivered to the book-keeper or any other person in trust, to be conveyed by any carriage belonging to their inn. The person who brought the plaintiff's parcel to be booked knew of the above terms, and that the parcel was above 5*l.* value, but did not discover the contents, and paid only the ordinary price of carriage, which amounted to 2*s.* with an additional demand of 2*d.* for booking. There were counts in the declaration for money had and received, lent and advanced, &c.; and the plaintiff finding that by the *express* terms of the printed proposal, he could not recover even to the amount of 5*l.* claimed a ver-

Law concerning masters of vessels.

Though no substantial difference is assignable between carriage by *land* and carriage by *water*, or, in other words, between a *waggon* and a *barge*, yet it soon became necessary for the courts to declare, as they did in the reign of JAMES I., that a *common hoyman*, like a common *waggoner*, is responsible for goods committed to his custody, even if he be *robbed* of them [*g*]; but the reason said to have been given for [107]

[*g*] Hob. *ca.* 30. 2 Cro. 330. *Rich* and *Kneeland.* "The *first* case of the kind," said Lord *Holt*, "to be found "in our books." 12 Mod. 480.

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a verdict for the 2*s.* 2*d.* in order to secure his costs, no money having been paid into court by the defendants, or tendered before the action was commenced; but the court decided that the plaintiff was not entitled either to the 5*l.* or the money advanced for the carriage or booking. In the above case no proof appears to have been adduced of *negligence*, or *conversion* of the parcel, by the defendants or their servants; and it would have been inconsistent with legal principles to have *presumed* that the defendants acted contrary to the trust reposed in them.

this

this judgment, namely, because *he had his hire*, is not the true one; since, as we have before suggested, the *recompence* could only make him liable for *temerity* and *imprudence*; as if a bargemaster were rashly to shoot a bridge, *when the bent of the weather is tempestuous*; but not for a *mere casualty*, as if a hoy in good condition, shooting a bridge *at a proper time*, were driven against a pier by a sudden breeze, and overset by the violence of the shock [*h*]; nor, by parity of reason, for any other force too great to be resisted [*i*]: the *public* employment of the *hoyman*, and that *distrust* which an ancient writer justly calls the *sinew of wisdom*, are the real grounds of the law's rigour in making such a person responsible for a loss by *robbery*.

[*h*] 1 Stra. 128. *Amies* and *Stevens*.

[*i*] Palm. 548. W. Jo. 159. See the doctrine of *inevitable accident* most learnedly discussed in *Desid. Heraldi* Animadv. in *Salmasii* Observ. in Jus *Att.* et *Rom.* cap. xv.

All

All that has just been advanced concerning a *land*-carrier may, therefore, be applied to a *bargemaster* or *boatman:* but, in case of a tempest, it may sometimes happen that the law of *jetson* and *average* may occasion a difference. *Barcroft*'s case, as it [108] is cited by Chief Justice *Rolle*, has some appearance of hardship: "a box of *jewels* "had been delivered to a ferryman, *who* " *knew not what it contained*, and a sudden " storm arising in the passage, he threw " the box into the sea; yet it was resolved " *that he should answer for it* [*k*]:" now I cannot help suspecting, that there was proof in this case of *culpable negligence*, and probably the casket was both *small* and *light* enough to have been kept longer on board than other goods; for in the case of *Gravesend* barge, cited on the bench by Lord *Coke*, it appears, that the pack which was thrown overboard in a tempest, and for which the

[*k*] All. 93.

bargeman

bargeman was holden *not answerable*, was of great value *and great weight*; although this last circumstance be omitted by *Rolle*, who says only, that the master of the vessel had *no information of its contents* [*l*].

The subtility of the human mind, in finding distinctions, has no bounds; and it was imagined by some, that, whatever might be the obligation of a *barge*-master, there was no reason to be equally rigorous in regard to the master of a *ship*; who, if he carry goods for *profit*, must indubitably answer for the *ordinary neglect* of himself or his mariners, but ought not, they said, to be chargeable for the violence of *robbers*: it was, however, otherwise decided
[109] in the great case of *Mors* and *Slew*, where "eleven persons armed came on board the "ship *in the river*, under pretence of *im-*"*pressing seamen*, and forcibly took the

[*l*] 2 Bulstr. 280. 2 Ro. Abr. 567.

"chests

" chests which the defendant had engaged " to carry;" and though the master was entirely blameless, yet Sir *Matthew Hale* and his brethren, having heard both civilians and common lawyers, and, among them, Mr. HOLT for the plaintiff, determined, on the principles just before established, that the bailor ought to recover [*m*]. This case was frequently mentioned afterwards by Lord *Holt*, who said, that " the declaration was drawn by the " greatest pleader in *England* of his " time [*n*]."

[*m*] 1 Ventr. 190. 238. Raym. 220. (41)
[*n*] Ld. Raym. 920.

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(41) By Stat. 7 Geo. II. chap. 15, § 1, it is enacted, that ship-owners shall not be liable for any loss arising from the misconduct of the master or mariners, beyond *the value of the ship and freight*: see the case of " *Sutton* v. *Mitchell*," 1 Term Rep. 18.

Still

Still farther: since neither the *element*, on which the goods are carried, nor the *magnitude* and *form* of the carriage, make any difference in the responsibility of the bailee, one would hardly have conceived, that a diversity could have been taken between a *letter* and any other thing. Our *common* law, indeed, was acquainted with no such diversity; and a *private* post-master was precisely in the situation of another carrier; but the statute of CHARLES II. having established a *general* post-office, and taken away the liberty of sending letters by a *private* post [*o*], it was thought, that an alteration was made in the obligation of the post-master *general*; and in the case of *Lane* and *Cotton*, three judges determined, against the fixed and well-supported opinion of Chief Justice HOLT, "that the "post-master was *not* answerable for the

[110]

Case of LANE and COTTON.

[*o*] 12 Cha. II. ch. 35. See the subsequent statutes.

"loss

" loss of a letter with exchequer-bills in " it [*p*]:" now this was a case of *ordinary* neglect, for the bills were *stolen* out of the plaintiff's letter *in the defendant's office* [*q*]; and

[*p*] Carth. 487. 12 Mod. 482. (42)

[*q*] In addition to the authorities before cited, p. 44. n. [*o*], for the distinction between a loss by *ſtealth* and by *robbery*, see *Dumoulin*, tract. *De eo quod interest*, n. 184. and ROSELLA CASUUM, 28. b. This last is the book which *St. German* improperly calls *Summa Rosella*, and by misquoting which he misled me in the passage concerning *the fall of a house*, p. 68. The words of the author, *Trovamala*, are these: " Domus tua *minabatur ruinam*; do- " mus

(42) 1 Ld. Raym. 646. S. C. See also Whitfield v. Lord le Despencer, Cowper, 754. where the decisions in Lane v. Cotton is confirmed: and where it is settled, that no action of the kind can be supported except in the circumstance of *personal* misconduct in any party employed by the Post-Office. Lord Holt's, and our author's, reasoning on the subject certainly possesses the advantage of *analogy*, but in the last case Lord Mansfield (764) places the post establishment in a new light; and the two concurring determinations now give the *law* on this point, producing that " certainty," which, as Lord Coke observes, " is the mother of quiet and repose."

and as the master has a great *salary* for the discharge of his trust; as he ought clearly to answer for the acts of his clerks and agents; as the statute, professedly enacted for *safety* as well as *dispatch* could not have been intended to deprive the subject of any benefit which he before enjoyed; for these reasons, and for many others, I believe that *Cicero* would have said what
[111] he wrote on a similar occasion to *Trebatius*, "Ego tamen SCÆVOLÆ assentior [*r*]." It would, perhaps, have been different *under the statute*, if the post had been *robbed* either by day or by *night*, when there is a necessity of travelling, but even that question would have been disputable; and here I may conclude this division of my Essay with observing, in the plain but emphatical

" mus corruit, et interficit equum tibi *commodatum*; certè " non potest dici casus fortuitus; quia *diligentissimus* repa- " rásset domum, vel ibi non habitásset; si autem domus " *non* minabatur ruinam, sed *impetu tempestatis* validæ " corruit, non est tibi imputandum."

[*r*] Epist. ad Fam. VII. 22.

language

language of St. GERMAN, "that all the "*former* diversities be granted by secondary "conclusions derived upon the law of rea- "son, *without any statute made in that be-* "*half:* and, peradventure, laws and the "conclusions therein be the more plain "and the more open; for *if any statute* "*were made therein*, I think verily, more "doubts and questions would arise *upon* "*the statute*, than doth now, when they "be only argued and judged after the "*common* law [*s*]."

Before I finish the *historical* part of my Essay, in which I undertook to demonstrate "that a perfect harmony subsisted on this "interesting branch of jurisprudence in the "codes of nations *most eminent for legal* "*wisdom* [*t*]," I cannot forbear adding a few remarks on the institutions of those

[*s*] Doct. *and* Stud. *dial.* 2. *chap.* 38. last sentence.
[*t*] P. 11.

Laws of the Northern nations.

[112]

nations who are generally called *barbarous*, and who seem in many instances to have deserved that epithet: although traces of sound reasoning and solid judgment appear in most of their ordinances.

By the ancient laws of the WISIGOTHS, which are indeed rather obscure, the "keeper "of a horse or an ox for *hire*, as well as a "*hirer for use*, was obliged, if the ani- "mal *perished*, to return another of equal "worth:" the law of the *Baiuvarians* on this head is nearly in the same words; and the rule is adopted with little alteration in the capitularies of *Charlemagne* and *Lewis the Pious* [*u*], where the *Mosaic* law before cited concerning a *borrower* may also be found [*w*]. In all these codes a *depositary* of gold, silver, or valuable trinkets, is made

[*u*] Lindenbrog, LL. *Wisigoth.* lib. 5. tit. 5. § 1, 2, 3. and LL. *Baiuvar.* tit. 14. § 1, 2, 3, 4. *Capitul.* lib. 5. § 204.

[*w*] *Capitul.* lib. 6. § 22. Exod. xxii. 14, 15.

chargeable,

chargeable, if they are destroyed by *fire*, and *his own* goods perish *not* with them; a circumstance which some other legislators have considered as *conclusive* evidence of gross neglect or fraud: thus by the old *British* Tract, called the Book of CYNAWG, a person, who had been *robbed* of a deposit, was allowed to clear himself by making oath, with compurgators, that he had no concern in the robbery, *unless he had saved his own goods*; and it was the same, I believe, among the *Britons* in the case of a loss by *fire*, which happened without the fault of the bailee; although HOWEL *the Good* seems to have been rigorous in this [113] case for the sake of public security [x]. There was one regulation in the *Northern* code, which I have not seen in that of any other nation: if precious things were de-

Laws of the Britons.

[x] LL. *Hywel Dda*, lib. 3. cap. 4. § 22. and lib. 3. cap. 3. § 40. See also *Stiernh.* De Jur. Sveon. p. 256, 257.

posited

posited and *stolen*, time was given to search for the thief, and if he could not be found within the time limited, a *moiety* of the value was to be paid by the depositary to the owner, " ut damnum ex medio uterque " sustineret [*y*]."

Now I can scarce persuade myself, that the phrase used in these laws, *si id perierit*, extends to a perishing by *inevitable accident*; nor can I think that the old *Gothic* law, cited by *Stiernhook*, fully proves his assertion, that " a depositary was respon- " sible for *irresistible force*;" but I observe, that the military lawgivers of the North, who entertained very high notions of good faith and honour, were more strict than the *Romans* in the duties by which depositaries and other trustees were bound: an exact conformity could hardly be expected between the ordinances of polished states,

[*y*] LL. *Wisigoth.* lib. 5. tit. 5. § 3.

and

and these of a people who could suffer disputes concerning bailments to be decided by *combat*; for it was the Emperor *Frederick* II. who abolished the trial by [114] battle in cases of contested deposits, and substituted a more rational mode of proof [z].

Laws of the Indians.

I purposely reserved to the last the mention of the HINDU, or *Indian*, code, which the learning and industry of my much-esteemed friend Mr. *Halhed* has made accessible to *Europeans* (43), and the PERSIAN

[z] LL. *Longobard.* lib. 2. tit. 55. § 35. *Constit. Neapol.* lib. 2. tit. 34.

(43) By an English translation published in 1781. the preface to the work contains many valuable remarks on the history and antiquities of India: with respect to the code, Sir William Jones truly observes that "the rules of the *Pundits* concerning *succession* "to *property*, the *punishment* of *offences*, and the *cere-* "*monies* of *religion*, are widely different from ours;" it may, however, be remarked, that the chapter "of "the

SIAN translation of which I have had the pleasure of seeing: these laws, which must *in all times* be a singular object of curiosity, are *now* of infinite importance; since the happiness of millions, whom a series of

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" the division of inheritable property," and that " of " justice," are by no means unworthy the attention of the British lawyer, who is disposed to extend the researches connected with his professional science. From the following passage in the chapter " of justice," a *tyro* at the bar may derive some profitable instruction in the important and difficult art of cross-examination. " When two persons, upon a quarrel, refer to arbi- " trators, those arbitrators, at the time of examina- " tion, shall observe both the plaintiff and defendant " narrowly, and take notice if either, and which of " them, when he is speaking, hath his voice faulter " in his throat, or his colour change, or his forehead " sweat, or the hair of his body stand erect, or a " trembling come over his limbs, or his eyes water; " or if, during the trial, he cannot stand still in his " place, or frequently licks and moistens his tongue, " or hath his face grow dry, or in speaking to one " point, wavers and shuffles off to another, or if any " person puts a question to him, is unable to return " an answer;—from the circumstances of such com- " motions they shall distinguish the guilty party." Halhed's Code of Gentoo Laws, c. 3. p. 105.

amazing

amazing events has subjected to a *British* power, depends on a strict observance of them.

It is pleasing to remark the similarity, or rather identity, of those conclusions, which pure unbiassed reason in all ages and nations seldom fails to draw, in such juridical inquiries as are not fettered and manacled by *positive* institution; and although the rules of the *Pundits* concerning *succession* to *property*, the *punishment* of *offences*, and the *ceremonies* of *religion*, are widely different from ours, yet in the great system of *contracts* and the common intercourse between man and man, the POOTEE of the *Indians* (44) and the DIGEST of the *Romans* are by no means dissimilar[*a*],

[*a*] "Hæc omnia," says GROTIUS, "*Romanis* quidem "congruunt legibus, sed non ex illis primitùs, sed ex "*æquitate naturali.* veniunt: quare eadem apud alias "quoque gentes reperire est." De Jure *Belli* ac *Pacis*, lib. 2. cap. 12. § 13.

(44) Dr. Robertson (see his Disquisition on India, Appendix, p. 247—254.) bestows his approbation on the Indian Code, and compares it with that of Justinian.

Thus it is ordained by the sages of *Hindustán*, that "a depositor shall carefully "inquire into the character of his intended "depositary; who, if he undertake to "keep the goods, shall preserve them with "*care* and *attention*; but shall not be "bound to restore the value of them if "they be *spoiled by unforeseen accident*, or "*burned*, or *stolen*; UNLESS he *conceal* "any part of them that has been saved, "or unless *his own effects be secured*, or "unless the accident happen after his *re-* "*fusal* to redeliver the goods on a demand "made by the depositor, or while the de- "positary, against the nature of the trust, "presumes to *make use* of them:" in other words, "the bailee is made answerable for "*fraud*, or for *such negligence* (45) as ap- "proaches to it [*b*]."

So

[*b*] *Gentoo* Laws, chap. 4. See before, P. 47.

(45) The words of this part of the Braminical institutions are solemn and remarkable: they prove that

So a *borrower* is declared to be chargeable even for *casualty* or *violence*, if he fail to return the thing after the completion of the business for which he borrowed it; but not, if it be *accidentally* lost or *forcibly* seized, *before* the expiration of the time, or the conclusion of the affair, for which it was lent [*c*]: in another place it is provided, that, if a *pledge* be damaged or lost by *unforeseen accident*, the creditor shall nevertheless recover his debt with interest, [116] but the debtor shall not be intitled to the

[*c*] Same chapter. See before, p. 68.

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that the oriental notions on the subject of hospitality to *persons*, are extended with scrupulous consistency to the deposit of *goods*. "If a person should make use "of any property intrusted to him, or it be spoiled "for want of his care and attention, then whatever "crime it is for a woman to abuse her husband, or "for a man to murder his friend, the same degree of "guilt shall be imputed to him, and the value of "the trust must be made good." Gentoo Laws, c. 4. p. 120.

value of his pawn [*d*]; and that, if the pledgee *use* the thing pledged, he shall pay the value of it to the pledgor in case of its loss or damage, whilst he uses it [*e*].

In the same manner, if a person *hire* a thing *for use*, or if any *metal* be delivered to a *workman*, for the purpose of making vessels or ornaments, the bailees are holden to be discharged, if the thing bailed be destroyed or spoiled by *natural* misfortune or the injustice of the *ruling power*, UNLESS it be kept *after the time* limited for the return of the goods, or the performance of the work [*f*].

All these provisions are consonant to the principles established in this Essay; and I cannot help thinking, that a clear and con-

[*d*] Chap. 1. § 1. Before, p. 84, 85.
[*e*] Chap 1. § 2. Before, p. 81.
[*f*] Chap. 4. and chap. 10. Before, p. 88. 91.

cise

cise treatise, written in the *Persian* or *Arabian* language, on the law of *Contracts*, and evincing the general conformity between the *Asiatic* and *European* systems, would contribute, as much as any regulation whatever, to bring our *English* law into good odour among those whose fate it is to be under our dominion, and whose happiness ought to be a serious and continual object of our care.

Thus have I proved, agreeably to my undertaking, that *the plain elements of natural law*, on the subject of BAILMENTS, [117] *which have been traced by a short analysis*, are recognised and confirmed by the wisdom of nations [*g*]; and I hasten to the third, or *synthetical*, part of my work, in which from the nature of it, most of the *definitions* and *rules* already given must be repeated with little variation in *form*,

[*g*] Before, p. 4 and 11.

and

and none in *substance:* it was at first my design to subjoin, with a few alterations, the *Synopsis* of DELRIO; but finding that, as *Bynkershoek* expresses himself with an honest pride, *I had leisure sometimes to write, but never to copy*, and thinking it unjust to embellish any production of mine with the inventions of another, I changed my plan; and shall barely recapitulate the doctrine expounded in the preceding pages, observing the method which logicians call *Synthesis*, and in which all sciences ought to be explained.

III. The Synthesis.

Definitions.

I. To begin then with *definitions:* 1. BAILMENT *is a delivery of goods in trust, on a contract expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use for which they were bailed shall have elapsed or be performed.*

2. DE-

2. DEPOSIT is a *bailment* of goods *to be kept for the bailor without a recompence.*

3. MANDATE is a *bailment* of goods, *without reward*, to be *carried from place to place*, or *to have some act performed about them.*

4. LENDING FOR USE is a *bailment* of [118] *a thing* for a certain time *to be used* by the borrower *without paying for it.*

5. PLEDGING is a *bailment* of goods by a debtor to his creditor *to be kept till the debt be discharged.*

6. LETTING TO HIRE is, 1. a *bailment* of A THING *to be used* by the hirer *for a compensation in money*; or, 2. a *letting out* of WORK and LABOUR to be *done*, or CARE and ATTENTION to be *bestowed*, by the bailee *on the goods bailed*, and that for *a pecuniary recompence*; or, 3. of CARE and PAINS in *carrying the things delivered from one place to another for a stipulated or implied reward.*

7. IN-

7. INNOMINATE BAILMENTS are those where the *compensation* for the *use* of a thing, or for *labour* and *attention*, is *not pecuniary;* but either, 1. the *reciprocal use* or the *gift* of some *other* thing; or, 2. *work* and *pains*, *reciprocally* undertaken; or, 3. the *use* or *gift* of another thing in consideration of *care* and *labour*, and conversely.

8. ORDINARY *neglect* is the *omission* of that *care* which *every man of common prudence*, *and capable of governing a family*, takes of *his own* concerns.

9. GROSS *neglect* is the *want* of that *care* which *every man of common sense*, *how inattentive soever*, takes of *his own* property.

10. SLIGHT *neglect* is the *omission* of that *diligence* which *very circumspect and*
[119] *thoughtful persons* use in securing *their own* goods and chattels.

11. A

11. A NAKED CONTRACT is a contract made without *consideration* or *recompence*.

II. The *rules*, which may be considered as *axioms* flowing from natural reason, good morals, and sound policy, are these: Rules.

1. A bailee, who derives *no benefit* from his undertaking, is responsible only for GROSS neglect.

2. A bailee, who *alone* receives *benefit* from the bailment, is responsible for SLIGHT neglect.

3. When the bailment is *beneficial* to *both* parties, the bailee must answer for ORDINARY neglect.

4. A SPECIAL AGREEMENT of any bailee to answer for *more* or *less*, is in general valid.

5. ALL bailees are answerable for actual FRAUD, even *though the contrary be stipulated.*

6. No bailee shall be charged for a loss by *inevitable* ACCIDENT or *irresistible* FORCE, except by *special agreement*.

7. ROBBERY by *force* is considered as *irresistible*; but a loss by *private* STEALTH is *presumptive* evidence of *ordinary* neglect.

8. GROSS neglect is *a violation of good faith*.

9. NO ACTION lies to compel performance of a *naked contract*.

10. A reparation may be obtained by suit for every DAMAGE occasioned by an INJURY.

[120] 11. The negligence of a SERVANT, acting *by his master's express or implied order*, is the negligence of the MASTER.

Propositions.

III. From these *rules* the following *propositions* are evidently deducible:

1. A DEPOSITARY is responsible only for GROSS neglect; or, in other words, for a *violation of good faith*.

2. A

2. A DEPOSITARY, whose character is known to his depositor, shall not answer for *mere neglect*, if he take *no better care of his own* goods, and *they also* be spoiled or destroyed.

3. A MANDATARY *to carry* is responsible only for GROSS neglect, or *a breach of good faith.*

4. A MANDATARY *to perform a work* is bound to use *a degree of diligence adequate to the performance of it.*

5. A man cannot be compelled by ACTION to perform his promise of engaging in a DEPOSIT or a MANDATE.

6. A reparation may be obtained by suit for DAMAGE occasioned by the *non-performance* of a promise to become a DEPOSITARY or a MANDATARY.

7. A BORROWER FOR USE is responsible for SLIGHT negligence.

8. A PAWNEE is answerable for ORDINARY neglect.

9. The HIRER of a THING is answerable for ORDINARY neglect.

[121] 10. A WORKMAN for HIRE must answer for ORDINARY neglect of the goods bailed, and apply a *degree of* SKILL *equal to his undertaking*.

11. A LETTER to HIRE of his CARE and ATTENTION is responsible for ORDINARY negligence.

12. A CARRIER for HIRE, by *land* or by *water*, is answerable for ORDINARY neglect.

Exceptions. IV. To these *rules* and *propositions* there are some *exceptions :*

1. A man who *spontaneously* and *officiously* engages to *keep*, or to *carry*, the goods of another, though *without reward*, must answer for SLIGHT neglect.

2. If a man, through *strong persuasion* and with *reluctance*, undertake the execution of a MANDATE, no more can be required

required of him than *a fair exertion of his ability*.

3. ALL bailees become responsible for losses by CASUALTY or VIOLENCE, *after* their *refusal* to return things bailed on a LAWFUL DEMAND.

4. A BORROWER and a HIRER are answerable in ALL EVENTS, if they *keep* the things borrowed or hired *after the stipulated time*, or *use* them *differently* from their agreement.

5. A DEPOSITARY and a PAWNEE are answerable in ALL EVENTS, if they *use* the things depo ited or pawned.

6. An INNKEEPER is chargeable for the goods of his guest *within his inn*, if the guest be *robbed* by the *servants* or *inmates* of the keeper.

7. A COMMON CARRIER, by *land* or [122] by *water*, must indemnify the owner of the goods carried, if he be ROBBED of them.

V. It

General corollary and remark.

V. It is *no* exception, but a *corollary*, from the *rules*, that "every bailee is re-"sponsible for a loss by ACCIDENT or "FORCE, however *inevitable* or *irresistible*, "if it be *occasioned* by that *degree of negli-*"*gence*, for which the nature of his con-"tract makes him generally answerable;" and I may here conclude my discussion of this important title in jurisprudence with a general and obvious *remark*; that "*all* "the preceding rules and propositions may "be diversified to *infinity* by the *circum-*"*stances* of every particular case;" on which circumstances it is on the *Continent* the province of a *judge* appointed by the sovereign, and in ENGLAND, to our constant honour and happiness, of a *jury* freely chosen by the parties, *finally* to decide: thus, when a painted *cartoon*, pasted on canvas, had been *deposited*, and the bailee kept it so near a damp wall, that it peeled and was much injured, the question, "whe-"ther

"ther the depositary had been guilty of "GROSS neglect," was properly left to the jury, and, on a verdict for the plaintiff with pretty large damages, the court refused to grant a new trial [*b*]; but it was the judge who determined, that the defendant was by *law* responsible for *gross* negligence *only*; and if it had been proved, that the bailee had kept *his own* pictures *of the same sort* in the same place and manner, and that *they too* had been spoiled, a new trial would, I conceive have been granted; and so, if no more than SLIGHT neglect had been committed, and the jury had, nevertheless, taken upon themselves to decide against law, that a bailee *without reward* was responsible for it.

[123]

Should the *method* used in this little tract be approved, I may possibly not want inclination, if I do not want leisure, to dis- Conclusion.

[*b*] 2 Stra. 1099. *Mytton* and *Cock*.

cuss

cuss in the same form *every* branch of *English* law, *civil* and *criminal*, *private* and *public*; after which it will be easy to separate and mould into distinct works, the three principal divisions; or the *analytical*, the *historical*, and the *synthetical*, parts.

The great system of jurisprudence, like that of the Universe, consists of many subordinate systems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully persuaded myself, is reducible to a few plain *elements*, either the wise *maxims* of national policy and general convenience, or the *positive* rules of our forefathers, which are seldom deficient in wisdom or utility: if LAW *be* a *science*, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of *reason*; but if it be *merely* an unconnected series of decrees and

and ordinances, its use may remain, though its dignity be lessened, and He will become the greatest lawyer who has the strongest habitual or artificial *memory*. In practice, [124] law certainly employs *two* of the mental faculties; *reason*, in the primary investigation and decision of points *entirely new*; and *memory*, in transmitting to us the reason of sage and learned men, to which our own ought invariably to yield, if not from a becoming modesty, at least from a just attention to that object, for which all laws are framed and all societies instituted, THE GOOD OF MANKIND.

APPENDIX.

Trinity Term 2 Annæ reginæ.

Coggs *v.* Bernard.

2 *Ld. Raym.* 909.

S. C. Com. 133. Salk. 26. 3 Salk. 11. Holt. 13. Entry. Salk. 735. 3 Ld. Raym. 163.

If a man undertakes to carry goods (*a*) safely and securely, he is responsible for any damage they may sustain in the carriage thro' his neglect tho' he was not a common carrier and was to have nothing for the carriage. Vide 1 H. Bl. 158.

In an action upon the case the plaintiff declared, *quod cum Bernard* the defendant, the tenth of *November*, 13 *Will.* 3. at, *&c. assumpsisset, salvo et secure elevare (Anglice*, to take up*)* several hogsheads of Brandy then in a certain cellar in *D. et salvo et secure deponere (Anglice*, to lay them down again*)* in a certain other cellar in *Water-lane*, the said defendant and his servants and agents *tam negligenter et improvide* put them down again into the said other cellar, *quod per defectum curæ ipsius* the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, *viz.* so many gallons of brandy, was spilt. After not guilty pleaded, and a verdict for the

(*a*) Vide ante, 60.

plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had any thing for his pains. And the case being thought to be a case of great consequence, it was this day argued *seriatim* by the whole court.

Gould Justice. I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way, and that any man, that undertakes to carry goods, is liable to an action, be he a common carrier or whatever he is, if through his neglect they are lost, or come to any damage: and if a *præmium* be laid to be given, then it is without question so. The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without any thing to be had for his pains, an (*a*) action will not lie for non-performance, because it is *nudum pactum*. So is the 3 *H.* 6. 36. So if goods are deposited with a friend, and are stolen from him, no action will lie. 29 *Ass.* 28. But there will be a difference in that case upon the evi-

(*a*) Vide 2 *Ld. Raym.* 919.

dence,

dence, how the matter appears; if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action; otherwise, if there be no gross neglect. So is *Doct. and Stud.* 129. upon that difference. The same difference is where he comes to goods by finding. *Doct. and Stud. ubi supra. Ow.* 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable, without a gross neglect. So is *Keilw.* 160. 2 *H.* 7. 11. 22 *Ass.* 41. 1 *R.* 10. *Bro. action sur le case*, 78. *Southcote*'s case is a hard case indeed, to oblige all men, that take goods to keep to a special acceptance, that they will keep them as safe as they would do their own, which is a thing no man living that is not a lawyer could think of: and indeed it appears by the report of that case in *Cro. El.* 815. that it was adjudged by two judges only, *viz. Gawdy* and *Clench*. But in 1 *Ventr.* 121. there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for 30*l.* the defendant shewed that he locked the money up in his master's warehouse, and it was stole from thence, and that was held to be a good account.

2 *Ld. Raym.* 910.

account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms.

Powys agreed upon the neglect.

Powell. The doubt is, because it is not mentioned in the declaration, that the defendant had any thing for his pains, nor that he was a common porter, which of itself imports a hire, and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend; when there is not any particular neglect shewn? And I hold, an action will lie, as this case is. And in order to make it out I shall first shew, that there are great authorities for me, and none against me; and then secondly, I shall shew the reason and *gist* of this action; and then thirdly, I shall consider *Southcote*'s case.

1. Those authorities in the *Register* 110. *a. b.* of the pipe of wine, and the cure of the horse, are in point, and there can be no answer given them, but that they are writs, which are framed short. But a writ upon the case must mention every thing that is material in the case, and nothing

thing is to be added to it in the count, but the time, and such other circumstances. But even that objection is answered by *Rast. Entr.* 13. *c.* where there is a declaration so general. The year books are full in this point. 43 *Ed.* 3. 33. *a.* there is no particular act shewed. There indeed the weight is laid more upon the neglect than the contract. But in 48 *Ed.* 3. 6. and 19 *H.* 6. 49. there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 *H.* 7. 11. 7 *H.* 4. 14. these cases are all in point, and the action adjudged to lie upon the undertaking.

2. Now to give the reason of these cases, the *gist* of these actions is the undertaking. The party's special *assumpsit* and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, *&c.* So it is 1 *Jones* 179. *Palm.* 548. For the bailee is not bound, upon any undertaking against the act of God. Justice *Jones* in that case

2 *Ld. Raym.* 911.

case puts the case of the 22 *Ass.* where the ferryman overladed the boat. That is no authority I confess in that case, for the action there is founded upon the ferryman's act, *viz.* the overlading the boat. But it would not have lain, says, he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because they have a remedy against the wrong-doers: as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them; and therefore in that case he shall not be answerable. But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he has taken into his custody upon such an undertaking. An (*a*) action indeed will not lie for not doing the thing, for want of a sufficient consideration; but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded

(*a*) Vide 2 *Ld. Raym.* 919, and the books there cited.

founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you, upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the Countess of *Salop*. An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration, the lessor would let him live in the house, he promised to deliver up the house to him again in as good repair as it was then, the (*a*) action would have lain upon that special undertaking. But there the action was laid generally.

Warranty without a consideration is good.

(*a*) Vide Com. 627. Burr. 1638.

3. *Southcote*'s (*b*) case is a strong authority, and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the un-

(*b*) That notion in Southcote's case, 4 Rep. 83. b. that a general bailment and a bailment to be safely kept is all one, was denied to be law by the whole court, *ex relatione m'ri Bunbury*. Note to 3d Ed.

dertaking. But I cannot think, that a general bailment is an undertaking to keep the goods safely at all events. That is hard. *Coke* reports the case upon that reason, but makes a difference where a man undertakes specially, to keep goods as he will keep his own. Let us consider the reason of the case. For nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 *Ed.* 4. 40. *b.* there is such an opinion by *Danby*. The case in 3 *H.* 7. 4. was of a special bailment, so that that case cannot go very far in the matter. 6 *H.* 7. 12. there is such an opinion by the bye. And this is all the foundation of *Southcote*'s case. But there are cases there cited, which are stronger against it, as 10 *H.* 7. 26. 29 *Ass.* 28. the case of a pawn. My lord *Coke* would distinguish that case of a pawn from a bailment, because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep. 8 *Ed.* 2. *Fitzh. Detinue*, 59. the case of goods bailed to a man, locked up in a chest, and stolen; and for the reason of that case, sure it would be hard, that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all

2 *Ld. Raym.* 912.

all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers don't know that difference, or however it may be with them, half mankind never heard of it. So for these reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if (*a*) a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

(*a*) Vide ante 44.

Holt, Chief Justice. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at *Guildhall*. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is not chargeable by his trade, and a private person

cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to shew the grounds, upon which a man shall be charged with goods put into his custody, I must shew the several sorts of bailments. And (*a*) there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*, and it is that sort of bailment which is mentioned in *Southcote*'s case. The second sort is, when goods or chattels that are useful, are lent to a friend *gratis*, to be used by him; and this is called *commodatum*, because the thing is to be restored in *specie*. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed

(*a*) Vide ante 35.

2 *Ld. Raym.* 913.

Accommodatum.

Pawns.

rowed of him by the bailor; and this is called in *Latin vadium*, and in *English* a pawn or a pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation, which is upon persons in cases of trust.

Things to be carried, &c. for a reward.

To be carried without reward.

As to the (*a*) first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider, for what things such a bailee is answerable. He is not answerable, if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is I confess a great authority against me,

A man who receives goods to keep gratis for the use of the bailor is not answerable for their loss or for any damage they may sustain, unless he was guilty of some gross neglect with respect to them.

(*a*) Vide ante 36.

where

where it is held, that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But (*a*) my lord *Coke* has improved the case in his report of it, for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine, to shew an undisturbed rule and practice of the law according to this position. But to shew that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter,

Vide Str. 1099. Nor even then if he was guilty of the same neglect with respect to his own. D. acc. 2 Ld. Raym. 655. Semb. acc. Burr. 2370. Vide ante 46. 62.

(*a*) Vide 2 Ld. Raym. 655. Ante 41.

matter, and by them shew, that there never was any such resolution given before *Southcote*'s case. The 29 *Ass.* 28. is the first case in the books upon that learning, and there the opinion is, that the bailee is not chargeable, if the goods are stole. As for 8 *Edw.* 2. *Fitz. Detinue*, 59. where goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods. That case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 *Edw.* 4. 40. *b.* was but a debate at bar. For *Danby* was but a counsel then, though he had been chief justice in the beginning of *Ed.* 4. yet he was removed and restored again upon the restitution of *Hen.* 6. as appears by *Dugdale's Chronica Series*. So that what he said cannot be taken to be any authority, for he spoke only for his client; and *Genney* for his client said the contrary.

2 *Ld. Raym.* 914.

contrary. The case in 3 *Hen.* 7. 4. is but a sudden opinion, and that but by half the court; and yet that is the only ground for this opinion of my Lord *Coke*, which besides he has improved. But the practice has been always at *Guildhall*, to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice *Pemberton*'s time, and ever since, against the opinion of that case. When I read *Southcote*'s case heretofore, I was not so discerning as my brother *Powys* tells us he was, to disallow that case at first, and came not to be of this opinion, till I had well considered and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend, but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them; for the keeping them as he keeps his own, is an argument of his honesty. *A fortiori* he shall not be charged, where they are stolen without any neglect in him. Agreeable to this is *Bracton*, *lib.* 3. *c.* 2. 99. *b. J. S. apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam*

etiam ad id, si quid in re deposita dolo commiserit; culpæ autem nomine non tenetur, scilicet desidiæ vel negligentiæ, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare. As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods, than he takes of his own. This *Bracton* I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in *Justinian's Inst. lib. 3. tit. 15.* There the law goes farther, for there it is said, *Ex eo solo tenetur, si quid dolo commiserit: culpæ autem nomine, id est, desidiæ ac negligentiæ, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit non ei, sed suæ facilitati id imputare debet.* So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as

2 *Ld. Raym.* 915.

A gross neglect an evidence of fraud.

as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. *Hob.* 34. a covenant, that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrong-doers. 3 *Cro.* 214. *acc.* 2 *Cro.* 425. *acc.* upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong-doers when put in writing, it is hard it should do it more so when spoken. *Doct. and Stud.* 130. is in point, that though a bailee do promise to re-deliver goods safely, yet if he have nothing for keeping of them, he will not be answerable for the acts of a wrong-doer. So that there is neither sufficient reason nor authority to support the opinion in *Southcote*'s case; if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect. As to the second sort of bailment, *viz. commodatum* or lending *gratis*, the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable: as if a man should

Though a man who takes goods to keep gratis for the use of the bailee expressly undertakes to redeliver them safely, he is not responsible for any loss or damage occasioned by a wrong-doer. Sed vide ante 45.

The borrower of goods is responsible for any damage or loss if it was occasioned by his neglect. Vide ante 65. 72, 73.

should lend another a horse, to go Westward, or for a month; if the bailee go Northward, or keep the horse above a month, if any accident happen to the horse in the Northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in *Bracton*, *ubi supra:* his words are, *Is autem cui res aliqua utenda datur, re obligatur, quæ commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel prædonum, vel naufragio amiserit non est dubium quin ad rei restitutionem teneatur.* I cite this author, though I confess he

or if he used the goods in a manner not warranted by the terms of the loan Vide ante 68, 69.

2 Ld. Raym. 916.

Note in the Bracton before me, it is commodatam, but that must be a mistake, as you will find by Justinian, ubi supra, from whence Bracton has taken all his distinctions, and that almost word for word.

he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. *Bracton* says, the bailee must use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

The borrower of goods hall not be responsible for a loss by robber, unless the robbery was occasioned or facilitated by some neglect on his part. Vide. ante 66.

As to the third sort of bailment, *scilicet locatio* or lending for hire, in this case the bailee is also bound to take the utmost care and to return the goods, when the time of the hiring is expired. And here again I must recur to my old author, *fol.* 62. *b. Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem* (*a*) *diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi*

The hirer of goods is responsible wherever the borrower would be, sed vide ante 86. and not elsewhere.

(*a*) Vide ante 87.

nisi talem adhibuerit, de qua superius dictum est. From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the (*a*) bailee shall not be answerable in this case, if the goods are stolen.

(*a*) D. acc. 2 *Ld. Raym.* 1087.

As to the fourth sort of bailment, *viz. vadium* or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for (*b*) the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the (*c*) pawnee cannot use it, as clothes, *&c.* but if it be such, as will be never the worse, as if jewels for the purpose were pawned to a lady, she (*d*) might use them. But then she must do it at her peril, for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken

(*b*) S. P. 3 Salk. 268. Holt 528. Salk. 522.

2 Ld. Raym. 917.

(*c*) S. P. 3. Salk. 268. Holt 528. Salk. 522.

(*d*) S. P. 3 Salk. 268. Holt 28. Salk 522. vide ante 80, 81.

If a pawnee use the pawn about th keeping of which he is at no charge, he is answerable at all events for any loss or damage which may hap pen with respect to it whil he is using it. S. P. 3 Salk. 68. Holt 528. Salk. 522. vide ante 80, 81.

taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is *Ow.* 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c. then (*a*) the pawnee may use the horse in a reasonable manner, or milk the cow, &c. in recompence for the meat. As to the second point *Bracton* 99. *b.* gives you the answer. *Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere.* In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 *Ass.* 28, and *Southcote*'s case is. But indeed

(*a*) S. P. 3 Salk. 268. Holt 528. Salk. 522 vide ante 80, 81.

The pawnee of goods is responsible for an loss or damage with respect to the pawn while he is warranted in detaining it, if it was occasioned by his negligence. Vide ante 75.

deed the reason given in *Southcote*'s case is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the Book of *Assize*, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But indeed, if the money for which the goods were pawned, be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

otherwise he is not. S. P. 3 Salk. 26 . Salk. 512. vide ante 75.

But he is answerable at all events for any loss or damage which happens after he ought to have returned the pawn. S. P. 3 Salk. 263. Holt 528. Salk. 522. vide 2 *Ld Raym.* 753. Ante 79. A man that keeps goods by wrong is at all events answerable for their loss or damage, vide ante 70, 71.

As to the fifth sort of bailment, *viz.* a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person.

2 *Ld. Raym.* 918.

If goods are delivered to a person in a public employment for a purpose in respect of which he is to have a reward, he is answerable for any loss or damage which is not occasioned by the act of God or the king's enemies. S. P. Holt 131. R. acc. 1 Wils. 281. Barclay v. Yann B. R. E. T 24 G 3. Trent and Mersey Company v. Wood. B R. E. T. 25 G. 3. 1. T. R. 27. vide 2. *Ld. Raym.* 264. Str. 128. Burr. 2300. 2827. Ante 103.

person. First if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, *&c.* which case of a master of a ship was first adjudged 26 *Car.* 2. in the case of *Mors* v. *Slew.* *Raym.* 220. 1 *Vent.* 190. 238. The law charges this person thus intrusted to carry goods, against all events but acts of God and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, *&c.* and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailees, factors, and such like. And though a bailie is to have a reward for his management, yet he is only to do the best he can. And if he

A bailiff or factor, though he is to have a reward, is not answerable for any loss or damage which was

be

be robbed, &c. it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

not occassioned or facilitated by his neglect. S. P. Holt 131. Vide 1 Vent. 121. 2 Lev. 5.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy, in this case the defendant had not been answerable for it, because he was to have nothing for

A man to whom goods are delivered for a purpose in respect of which he is to have no reward, is not answerable for any loss or damage occasioned by a third person.

for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In *Bracton*, *lib.* 3. 100. it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in *English* an acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. *Vinnius* in his Commentaries upon *Justinian*, *lib.* 3. *tit.* 27. 684. defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur*. This undertaking obliges the undertaker to a diligent management, *Bracton*, *ubi supra*, says, *contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis*. I don't find this word in any other author of our law besides in this place in *Bracton*, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

Case lies for negligently executing a gratis commission. Vide 1 H. Bl. 158.

2 *Ld. Raym.* 919.

The reasons are, first, because in such a case, a neglect is a deceipt to the bailor. For when he

he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 *Roll. Abr.* 10. 2 *Hen.* 7. 11. a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, *viz.* his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

A breach of a trust undertaken voluntarily is a good ground for an action. Vide ante 56, 57.

But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry

(a) Vide ante 56, 57. 61.

these brandies from the one place to the other such a day, the (a) defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though no body could have compelled him to do the thing. The 19 *Hen.* 6. 49. and the other cases cited by my brothers, shew that this is the difference. But in the 11 *Hen.* 4. 33. this difference is clearly put, and that is the only case concerning this matter, which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court, what if he had built the house unskilfully, and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to *A.* and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and in *Yelv.* 4. judgment was given that the action would lie. But that judgment was afterwards

2 *Ld. Raym.* 920. If a man promises to re-deliver goods in consideration of having them delivered to him, an action will lie against him for not re-delivering them. Vide ante 50, 51.

afterwards reversed, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. *Yelv.* 128. But those cases were grumbled at, and the reversal of that judgment in *Yelv.* 4. was said by the judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 *Cro.* 667. *Tr.* 21 *Jac.* 1. in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of *Mors* v. *Slew* was drawn by the greatest drawer in *England* in that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point; but I don't know whether I may have

settled

settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

THE END.

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